

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 31386

LINDA MUELLENBERG,

Claimant and Appellant,

VS.

**REDFIELD ACE HARDWARE DBD INVESTMENT ENTERPRISES,
and FIRST DAKOTA INDEMNITY COMPANY,**

Employer and Insurer and Appellees.

**APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA**

**THE HONORABLE MARGO D. NORTHRUP
CIRCUIT COURT JUDGE**

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page numbers. Citations to the July 10, 2024 hearing before the Department are designated as "H.T." and the page number. Citations to the exhibits accepted into evidence are designated as "Ex." and the page number. Exhibit 1 is comprised of the claimant's medical records and cited as "Ex. 1" and the citation to the settled record. Citations to the Appendix are designated as "App." and the page number.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(1) and/or (2).

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. WHETHER THE DEPARTMENT ERRONEOUSLY CONFLATED “PHYSICAL CONDITION” AS SET FORTH IN SDCL 62-4-53 AND WORK RESTRICTIONS.

The Department held that work restrictions were required for permanent total disability benefits.

- *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, 956 N.W.2d 81
- *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 S.D. 95, 739 N.W.2d 264
- *Kurtz v. SCI*, 1998 S.D. 37, 576 N.W.2d 878

II. WHETHER THE DEPARTMENT CLEARLY ERRED IN HOLDING THAT CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED.

The Department held she was not and the Circuit Court affirmed.

- *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, 956 N.W.2d 81
- *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 S.D. 95, 739 N.W.2d 264
- *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916 (S.D. 1991)

STATEMENT OF THE CASE

On October 24, 2022, Linda Muellenberg filed a Petition for Hearing with the Department of Labor for worker's compensation benefits arising from a workplace injury that severely damaged her left eye and permanently impaired her vision. On November 17, 2022, her employer, Redfield Ace Hardware DBD Investment Enterprises, and its insurer, First Dakota Indemnity Company, filed their answer (R. 42).

On June 10, 2024, the Department entered its Order and Notice of Hearing "to determine Claimant's eligibility for benefits pursuant to the South Dakota Workers' Compensation Law, SDCL Title 62." (R. 165). The sole issue presented at the hearing was "whether Linda Muellenberg is permanently and totally disabled." (R. 176).

On July 10, 2024, a hearing was held before the Honorable Michelle M. Faw, Administrative Law Judge, at the offices of the Department of Labor and Regulation in Sioux Falls. (R. 178). In addition to testifying herself, Linda Muellenberg also called Roger Muellenberg, Jenny Uhrich, and Vocational Expert Tom Audet as witnesses. (R. 179). The employer and insurer did not call any witnesses. (R. 363).

All of the medical evidence was received by deposition and documentary evidence including the testimony of Muellenberg's treating physician (Dr. Alex Ringeisen) and an affidavit from the employer and insurer's retained independent medical examiner (Dr. Douglas Martin). (R.

363). In addition, the testimony of the employer and insurer's retained vocational expert (Chad Kollars) was received by deposition. (R. 363).

On January 13, 2025, the Department issued its decision. (R. 1212). Based on the evidence presented, the Department found that Muelenberg was not permanently and totally disabled because the medical providers did not issue a formal medical restriction specifically prohibiting her from driving. (R. 1215-1216). On March 17, 2025, the Department entered findings of fact and conclusions of law as drafted and proposed by Redfield Ace. (R. 1243).

On April 7, 2025, the Department entered its Order holding that "Claimant failed to meet her burden of persuasion showing that she qualifies for 'odd lot' disability" and that "Claimant is not entitled to permanent total disability benefits under SDCL 62-4-53." (R. 1254-1255).

Muelenberg appealed to the Hughes County Circuit Court of the Sixth Judicial Circuit. (R. 1). On January 16, 2026, the Honorable Margo D. Northrup, Circuit Judge, issued a memorandum decision and an order affirming the order entered by the Department. (R. 1359, 1367; App. 1, 2).

This appeal followed.

STATEMENT OF THE FACTS

Linda Muellenberg (“Muellenberg”) is a 63-year-old woman with an exemplary earnings history. (H.T. 6). After being a licensed practical nurse for several decades, Muellenberg worked a variety of jobs, including at Redfield Ace Hardware DBD Investment Enterprises (“Redfield Ace”) in Redfield, South Dakota starting in 2016 until the date of her workplace injury. (H.T. 7-9). She has never been fired from any place of employment and had absolutely no issues getting along with co-workers and supervisors. (H.T. 17-18).

At Redfield Ace, Muellenberg greeted customers, stocked and maintained merchandise, and assisted customers in finding products. (H.T. 9). Before her workplace injury, Muellenberg was able to perform all of her job duties, which included using a computer and cash register at waist height. (H.T. 10). Muellenberg had no issues with obtaining and maintaining employment, including commuting to and from her job from her home in rural Zell, South Dakota, before her work-related injury. (H.T. 9-13).

The workplace injury

On the day of the injury, December 3, 2020, there was a truckload of freight that had arrived at Redfield Ace, including large amounts of plastic PVC pipe. (H.T. 13). As Muellenberg was cutting off the shrink wrap on the PVC pipe, a bungee cord securing the pipe came loose off the wall and forcefully struck Muellenberg in her left eye. (H.T. 13-14). The bungee cord

directly hit the soft tissue of Muellenberg's exposed eyeball, *not* her eyelid. (H.T. 19). Immediately after her injury, Muellenberg's eye felt "horrifically painful." (H.T. 21).

Muellenberg was immediately transported by her boss to the emergency room and she was quickly referred to an ophthalmologist in Aberdeen, South Dakota for loss of vision, pain, light sensitivity and high pressure in her eye. (H.T. 22, 24); (Ex. 1, R. 973). As her eye was not improving, Muellenberg was referred to an eye specialist in Sioux Falls, South Dakota, but her complex care required additional specialization and she was transferred to an eye specialist in Minneapolis, Minnesota. (H.T. 28); (Ex. 1, R. 579, 730, 731). The examination revealed "visually significant lens opacity, lax zonules and vitreous prolapse," which were related to her traumatic eye injury. (Ex. 1, R. 594). On April 6, 2021, she underwent eye surgery in Minneapolis. (H.T. 30); (Ex. 1, R. 594). The surgery was to address "a decrease in [Muellenberg's] visual acuity now interfering with [her] activities of daily living" and the procedures included:

1. Phacoemulsification with posterior chamber lens implantation
2. Scleral incision
3. Subtotal vitrectomy
4. Sutured posterior chamber lens
5. Inferior peripheral iridotomy
6. Pupilloplasty

7. Express shunt trabeculectomy

(Ex. 1, R. 594). Muellenberg's post-surgical care was provided by Dr. Alex Ringeisen of Ophthalmology Associates. (H.T. 34); (Ex. 1, R. 674).

The effects of the damage to Linda Muellenberg's vision

Unfortunately, the injury caused permanent, irreversible damage and the surgery did not restore Muellenberg's eye to her pre-injury condition. After the surgery in April 2021, Muellenberg still struggled with residual issues including limited vision, pain, and pressure in her eye. She was diagnosed with cystoid macular edema, which is swelling in the back of her eye or in the retina. (Ex. 5, R. 1074). Her eye continues to be blurry, the pupil is permanently irregular, she has swelling in the back of her eye and the optic nerve has an enlarged cup-to-disc ratio.¹ (Ex. 5, R. 1074-1077). There are no further surgical recommendations as the risks outweigh any benefit. (Ex. 5, R. 1077).

These objective findings, as noted by her medical providers and the eye tests, have resulted in a myriad of effects on Muellenberg's daily life. Today, the effects of the injury and damage are:

- Muellenberg still feels a pulling sensation in her eyes, and as a result must rest her eyes multiple times a day, sometimes up to thirty minutes at a time. (H.T. 37, 53).
- Muellenberg has trouble reading, as she feels a pulling sensation in her eye that causes pain and discomfort. (H.T. 38).

¹ The optic nerve is the connection from the eye to the brain. (Ex. 5, R. 1076).

- The pressures in Muellenberg's eye change throughout the day and the fluctuation can cause her pain. (H.T. 35).
- When trying to read on her phone or trying to read a book, Muellenberg must pull them to her eye level in order to be able to see the words. (H.T. 39).
- Muellenberg has trouble using a keyboard as she cannot find the right key and has trouble appreciating how far or close objects are to her. (H.T. 40).
- Muellenberg takes medication every night due to the pressures in her eye. (H.T. 41).
- Muellenberg takes steroid medication twice per week for inflammation in her eye. (H.T. 41-42).
- Muellenberg takes medication daily for pain and swelling in her eye, usually by lunch time. (H.T. 42-43).
- Muellenberg has tunnel vision, meaning she cannot see beyond what is directly in front of her. (H.T. 45).
- The damage to the eye caused Muellenberg to lose her peripheral vision resulting in her inability to see to the left. (H.T. 45).
- Muellenberg cannot accurately assess and judge the distance between objects. (H.T. 46, 49).
- Muellenberg cannot accurately determine the speed of objects or rate of travel. (H.T. 46, 50).
- Muellenberg cannot accurately assess object permanency, which means she cannot accurately predict whether an object in front of her is moving or stationary. (H.T. 46-47).
- When riding in a vehicle, objects appear to Muellenberg faster than she can process them because her "brain can't catch up to what [her] eyes are doing." (H.T. 50).

The result of the injury, its irreparable damage and its residual effects is that Muellenberg has not driven more than a few miles at a time in over

five years. (H.T. 48). The farthest Muellenberg has driven since the injury is to her mother-in-law's house five miles away on a sparsely traveled gravel road at slow speeds. (H.T. 48). She has not driven on any highways, including into Redfield, since her workplace injury because of the safety concerns with her eye deficiencies including the inability to accurately judge distance, depth perception, speed and object permanency. (H.T. 48).

Muellenberg's difficulties with her vision and processing of information from her eyes to her optic nerve do not just apply to driving. When cooking and cleaning, Muellenberg oftentimes misplaces or misjudges objects because she cannot see the object or cannot judge its distance from her. (H.T. 48-50). For example, during the hearing in this matter, Muellenberg could not see the court reporter sitting ninety degrees to her left because she has no peripheral vision. (H.T. 51). When doing daily activities of living, Muellenberg oftentimes gets worn out and nauseous due to her vision problems, which requires her to lay down and take a break. (H.T. 53). Muellenberg has gotten a lot better at understanding when she is over-exerting herself, and as a result, she does not get as worn out and nauseous as she did in the past as she now understands her limitations and stays within them. (H.T. 55).

Roger Muellenberg

Roger Muellenberg ("Roger"), Muellenberg's husband, testified at the hearing. (H.T. 92). He testified that he and Muellenberg have lived in Zell,

South Dakota for decades and that there are around twenty people that live there. (H.T. 95). Roger testified how difficult and painful Muellenberg's recovery has been and that he has had to take time off work to help Muellenberg with her residual eye issues. (H.T. 102).

Roger also testified to a number of issues Muellenberg still deals with. (H.T. 105-107). He testified that Muellenberg has trouble with many household chores, such as laundry, misplacing objects, cooking, cleaning, and sewing. (H.T. 105-107). He confirmed that Muellenberg cannot use a computer for too long before she must take her eyes off it and rest her eyes. (H.T. 109). He further testified that Muellenberg struggles visually when operating objects with buttons and devices, such as using a television remote and using the keyboard on her computer. (H.T. 109).

Roger revealed that he does more of the household tasks since Muellenberg's workplace injury, such as cleaning, maintenance, and tending to their backyard garden. (H.T. 111). Roger confirmed that Muellenberg only drives on gravel roads in the countryside and only drives once or twice a month because of her diminished vision and inability to safely drive. (H.T. 112).

Jenny Uhrich

Jenny Uhrich ("Uhrich"), Muellenberg's sister, also testified at the hearing. (H.T. 119). She testified that she has been a driver for Muellenberg since her workplace injury, including to doctor appointments. (H.T. 121).

Uhrich testified that she has observed Muellenberg having trouble seeing objects when in a vehicle, including upcoming signs and animals. (H.T. 122). Uhrich explained that she does not feel comfortable with Muellenberg driving because she is not confident Muellenberg can see and process what she needs to safely drive. (H.T. 123).

Uhrich further explained that the only other time she saw Muellenberg in as much pain as she was in after the workplace injury was after Muellenberg had a baby. (H.T. 127). She testified that after the injury, there were instances when their family had to ask Muellenberg to leave the kitchen as she would misplace too many objects and her inability to help because of her depth perception deficiencies would be disruptive. (H.T. 128). Uhrich testified she also does not feel comfortable with Muellenberg handling knives or scissors because of her eye defects. (H.T. 129).

**Dr. Alex Ringeisen
(Treating Physician)**

Dr. Ringeisen, an ophthalmologist and vitreoretinal surgeon, is one of Muellenberg's treating physicians and testified by deposition. (Ex. 5, R. 1064). Dr. Ringeisen has exemplary qualifications, including an undergraduate degree in biology from the University of Minnesota, three years of ophthalmology training at the University of Wisconsin, and two years in a surgical vitreoretinal surgery fellowship at Retinol Consultants of Minnesota. (Ex. 5, R. 1066-1067). He has been in practice since 2019 as a vitreoretinal surgeon, or retinal specialist. (Ex. 5, R. 1066-1067). He

described his two year fellowship in retinal surgery as “specialty training in advanced surgical procedures really related to the back of the eye, or the retina, known as the most surgically complex tissues of eye, and so it’s actually – it’s probably one of the – one of the, if not the longest, kind of training process for an eye surgeon.” (Ex. 5, R. 1068).

Dr. Ringeisen first evaluated Muellenberg in October 2021, at a time when Muellenberg was still undergoing substantial treatment for her eye injury after the surgery. (Ex. 5, R. 1069). At that time, Dr. Ringeisen evaluated and treated Muellenberg for cystoid macular edema in her left eye and issues with visual acuity in her left eye. (Ex. 5, R. 1074). As Dr. Ringeisen described, Muellenberg’s pupil is irregular from the injury and subsequent surgery, and she now has a sutured in or sewed in intraocular lens in that eye. (Ex. 5, R. 1076). Dr. Ringeisen testified that Muellenberg also has a “shunt” in her left eye, which is a permanent surgical implant designed to help with swelling. (Ex. 5, R. 1078). He testified that her left eye contains a piece of scar tissue growing on the back wall of the eye and that the swelling at the membrane was the cause of her decreased visual acuity. (Ex. 5, R. 1076). According to Dr. Ringeisen, Muellenberg’s high pressure in her eye was caused by the enlarged cup-to-disc ratio in the optic nerve. (Ex. 5, R. 1076).

Dr. Ringeisen noted that Muellenberg’s examination and testing showed “significant deficiencies” in Muellenberg’s peripheral vision which

causes tunnel vision. (Ex. 5, R. 1079). Dr. Ringeisen also testified that because Muellenberg continues to have issues with her vision, including swelling and pain, she could be a candidate for surgery. (Ex. 5, R. 1077). However, as she is at high risk due to her glaucoma, Dr. Ringeisen advised against surgical intervention as the risks outweigh any type of benefit she may receive from the additional eye surgery. (Ex. 5, R. 1077). Dr. Ringeisen also noted that Muellenberg is susceptible to vision loss and further issues related to chronic inflammation in her left eye. (Ex. 5, R. 1085).

Regarding driving after an eye injury, Dr. Ringeisen defers to his patients based on their assessment of whether it is safe or not as he does not want to write generalized restrictions. (Ex. 5, R. 1082). He testified that given Muellenberg's severe issues with her vision and resultant deficiencies, it was "very reasonable" that Muellenberg does not drive on highways or at high rates of speed. (Ex. 5, R. 1083-1084). Dr. Ringeisen testified that some people with only one healthy eye can drive and others cannot as it is an individual assessment based on the specific patient and that patient's deficiencies or defects. (Ex. 5, R. 1083-1084). Dr. Ringeisen agreed that Muellenberg being unable to drive safely due to depth perception and peripheral vision problems was justifiable and consistent with her injury and diagnosis. (Ex. 5, R. 1082-1084).

IME hired by Redfield Ace

Dr. Douglas Martin ("Dr. Martin") was hired to perform an

independent medical examination.² (R. 124). He did not testify at the hearing or provide testimony via deposition. Even though Dr. Martin has no specialized training in the evaluation or treatment of eye disorders and has never performed any eye surgeries, he confirmed the defects with Muellenberg's eye and her reports of what she experiences. Dr. Martin's report stated "she currently describes her left eye situation as a pulling sensation. She occasionally will get some headaches." (R. 125). It further stated that Muellenberg has "visual field problems especially vertical gaze" and that "she has had some issues with depth perception type issues and with respect to gauging whether objects are actually moving or are stationary." (R. 126). Dr. Martin agreed that Muellenberg has depth perception issues with respect to gauging whether objects are actually moving or are stationary. (R. 126).

Furthermore, Dr. Martin's vision screening machine revealed Muellenberg's best vision with corrective lenses was 20/70. (R. 127). He stated that she "struggled with regards to phoria testing." (R. 127). Phoria testing is used to determine if there is misalignment of the eyes that occurs

² Dr. Martin is a well-known independent medical examiner, who is board certified in independent medical examinations. (R. 112-123). No where in his twelve-page resume does he note that he has been trained or specializes in eye injuries or diagnosing, testing or treating such injuries. (R. 112-123). Instead, as outlined by his presentations, his focus "primarily lies in the areas of disability assessment, causation analysis, evidence-based care of musculoskeletal injuries, drug and alcohol testing, and the use and misuse of the AMA Guides to the Evaluation of Permanent Impairment." (R. 121).

when binocular or both eyes viewing vision is broken. If the test is positive, that person has abnormal eye positions which can cause headaches, double vision and reading difficulties, all consistent with Muellenberg's testimony regarding what she experiences on a regular basis. As noted by Dr. Martin, Muellenberg had difficulty even performing the phoria testing. (R. 127).

Additionally, Dr. Martin observed that Muellenberg struggled with screening visual field examination as well. (R. 127). The visual field test, according to the American Academy of Ophthalmology, is how wide of an area of an eye can see when focused on a central point. It is a way to measure the vision in one eye and any vision loss that has occurred over time. It is also confined diagnosed blind spots. (R. 127).

As Dr. Martin placed Muellenberg at maximum medical improvement, she then needed to be assigned an impairment rating for her eye injury pursuant to SDCL 62-4-6. (R. 129). In order to accomplish this, Dr. Martin recommended specific tests to determine Muellenberg's impairment rating, which was performed four months later. (R. 129, 148-149). The Humphrey plot test confirmed what is undisputed and obvious – Muellenberg had permanent eye damage with lifelong residual effects. (R. 148) ("There were visual field abnormalities of the left eye, as described within the Humphrey plot."). Based on the deficiencies in Muellenberg's left eye, Dr. Martin assigned her a 9% whole body impairment rating. (R. 148).

Vocational expert Tom Audet

Tom Audet (“Audet”) is a certified rehabilitation counselor and testified at the hearing. (H.T. 91). He obtained his degree from Montana State University in vocational rehabilitation and related services in 1980. (H.T. 91). Audet has been a certified rehabilitation counselor since 1989 and he completes approximately one hundred hours of continuing education every five years to maintain his certification. (H.T. 91).

Audet has provided impartial vocational testimony for the Social Security Administration since 1992. (H.T. 94-95). As a vocational rehabilitation counselor for the state of Montana, he was promoted to a rehabilitation counselor supervisor and supervised approximately seven other rehabilitation counselors in that role. (H.T. 94-95). In 1992, Audet also started performing vocational evaluations in workers’ compensation cases, has testified at workers’ compensation hearings and has performed evaluations on how injuries affect a person’s ability to work and earn a living. (H.T. 95-96).

Audet conducted a comprehensive vocational interview and assessment for Muellenberg. In his report, dated January 12, 2024, Audet noted the following limitations that Muellenberg experiences as established by the medical evidence:

- Difficulty with depth perception varies day by day including lack of ability to judge distances and see objects that are a distance away.

- Dizziness and a feeling that everything is passing her by way too fast.
- Poor ability to judge distances.
- Very limited ability to use computers, as looking at a computer screen makes her dizzy and causes her to have headaches.
- Times where it is difficult for Muellenberg to keep her eyes open and distortion with blinks in her postoperative eye.
- Blurry vision with every blink.

(Ex. 2, R. 1050-1055).

In his report, Audet noted that the fact that Muellenberg lives in Zell is a key factor in her employability, as she would need to commute to Redfield or some other town to find employment. Audet noted that Muellenberg continues to experience difficulty with driving and daily commuting on a highway is not feasible for her. Audet's conclusions were as follows:

Muellenberg is unemployable due to her vision problems that interfere with her ability to look at and use computers and drive and commute daily;

Muellenberg lives in Zell, South Dakota, and would have to commute for a job; and

Given Muellenberg's difficulties with her vision, retraining would not be feasible for her because she would have to use computers to retrain in an online program and retraining will not solve the problem she has with driving and commuting.

(Ex. 2, R. 1050-1055).

During the hearing, Audet explained how he considered Muellenberg's limitations when performing his vocational analysis, including her

limitations with driving, her residual issues with her eye, her issues with using a keyboard, and her need to take frequent breaks when using a computer. (H.T. 137). Audet explained that, although Muellenberg has no formal work restrictions, he considered the objective findings of the defects of her eye and the subsequent limitations identified by Dr. Ringeisen and Muellenberg. (H.T. 140). Audet testified that the fact that Muellenberg lives in a small town in rural South Dakota played a role in his analysis, as there are no jobs available to Muellenberg in walking or biking distance. (H.T. 141).

In addition to looking at traditional jobs at a place of employment, Audet also researched whether there was any home-based employment. (H.T. 142). Unfortunately, all the jobs that Audet identified required the continuous use of a computer and screen. (H.T. 142). As Audet explained, Muellenberg would have great difficulty performing this work because she would have trouble seeing the screen, using the buttons on the phone, using the keyboard, and would have to take breaks – sometimes up to thirty minutes – from looking at a computer screen. (H.T. 143). He testified that if an employee is off task for up to fifty percent of a workday, it would be impossible to find and maintain employment. (H.T. 144).

Audet further testified that, based on his education, training, and experience to a reasonable degree of vocational certainty, Muellenberg's inability to drive and her inability to complete work assignments without

significant interruption because of her injuries would keep her from being successfully employed. (H.T. 146). He explained that Muellenberg's remote town, her rural labor market, and her inability to consistently use computers effectively further illustrates her inability to find and maintain employment. (H.T. 147).

Vocational witness hired by Redfield Ace

Redfield Ace hired Chad Kollars ("Kollars") as their vocational expert witness and he predictably ignored Muellenberg's objective deficiencies and limitations. He did not testify at the hearing and his deposition was submitted. (R. 1116). During his testimony, Audet explained how the job search performed by Kollars was based on the incorrect belief that Muellenberg had no limitations that affected her ability to work or ability to drive. (H.T. 151). Kollars did not take into consideration Muellenberg's challenges with driving when performing his vocational analysis and included Aberdeen, which is fifty three miles from Zell on U.S. Highway 218 with a speed limit of seventy miles per hour. (R. 1124, p. 26).

Kollars opined that there were jobs that Muellenberg could perform; however, his opinions were based on incorrect information and faulty assumptions. (R. 1123, p. 23). Kollars admitted that the basis of his opinions was his subjective interpretation of Muellenberg's medical records, which still showed that Muellenberg had a surgically implanted shunt to assist with drainage, a permanent irregular pupil because she has a sewed in intraocular

lens, scar tissue growing in the back of her eye, a history of complicated eye surgeries, inflammation, and swelling in her eye. (R. 1123, p. 24-25). Kollars admitted that he was aware that objective testing has shown significantly deficient peripheral vision and tunnel vision that Dr. Ringeisen testified to be a major contributing cause of Muellenberg's current difficulty driving. (R. 1124, p. 29). Kollars also admitted that he was aware that Muellenberg had difficulty seeing when looking down to table height, that she had pain from frequent fluid buildup in her eye, she had difficulty assessing the distance of objects when she turns her head, and had trouble assessing the distance of faraway objects. (R. 1124-1125, p. 29-30).

Kollars agreed that difficulty seeing a keyboard or a computer screen could affect a worker's ability to perform the duties a job may require. (R. 1125, p. 31). He also agreed that someone with difficulty looking down at objects could not perform the job of a sandwich artist as he identified in his report. (R. 1125, p. 31). And he admitted that he did not know about how Muellenberg's injury affected her activities of daily life because he never even spoke with Muellenberg, either in person or over the phone. (R. 1125, p. 32).

Kollars further admitted that his opinions were based on the assumption – which was incorrect – that Muellenberg has no deficiency in her vision when looking down at a keyboard or screen. (R. 1125, p. 33). Finally, he was forced to concede that he did not consider Muellenberg's tunnel vision, her peripheral vision, her need to take breaks to rest her eyes,

and her difficulty using computers when performing his analysis. (R. 1125-1126, p. 33-34).

Additional facts are set forth and discussed below.

STANDARD OF REVIEW

When reviewing agency decisions, a circuit court “shall give great weight to the findings made and inferences drawn ... on questions of fact.” SDCL 1-26-36. “The [C]ourt may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings ... or decisions are ... [c]learly erroneous in light of the entire evidence in the record[.]” SDCL 1-26-36 (emphasis added). “Thus, ‘the Department’s factual findings, including credibility assessments, are reviewed under the clearly erroneous standard.’” *Baker v. Rapid City Regional Hosp.*, 2022 S.D. 40, ¶ 29, 978 N.W.2d 368, 377-78 (quoting *Wise v. Brooks Constr. Servs.*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466). A finding is clearly erroneous when the reviewing court is “definitely and firmly convinced a mistake has been made.” *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶ 22, 956 N.W.2d 812, 819. “Even where specific credibility findings are absent, we defer to the Department’s overall assessment of the weight of the evidence when it is based upon live witness testimony. Nevertheless, we still review the Department’s factual findings for clear error.” *Id.* at ¶ 28, 820.

When an agency makes factual determinations on the basis of

documentary evidence such as depositions or medical records, however, the standard of review is de novo. *See Baker*, 2022 S.D. 40, ¶ 29, 978 N.W.2d at 378. This would apply to the testimony and evidence submitted for Kollars, Dr. Ringeisen and Dr. Martin. For that testimony, the standard of review in this administrative appeal is de novo, and this Court should give no deference to the Department's decision.

ARGUMENT

The sole question in Linda Muellenberg's case is this: should the workers' compensation system force an injured worker with significant eye defects to drive on highways when she has not done so for more than five years and cannot safely do so. The answer to this question must be no – Linda Muellenberg should not be forced to drive when she, with the agreement of her board-certified ophthalmologist, is not able to safely drive because of the numerous defects with her eye and vision.

The purpose of the workers' compensation system is not to force an injured worker to perform an act that may have life or death consequences. If Linda Muellenberg is forced to drive simply to financially support herself and her family, she is not only putting herself at risk but also putting every motorist she encounters on the road at risk because of her permanent eye defects. Even as a passenger, Muellenberg cannot accurately judge speeds and feels like her husband is driving at one hundred miles per hour because it feels like her brain cannot catch up to what her eyes are seeing, which is

evidenced by the objective testing showing damage to her optic nerve. (H.T. 50) (Ex. 5, R. 1074-1077). Requiring her to drive when it is not safe for her to do so is not in the purpose or spirit of the workers' compensation system.

This is especially true in a case such as this where the parties agree on almost all the background facts and objective medical evidence. The parties agree that Muellenberg suffered a serious, life-altering injury to her eye. The parties agree that the defects and deficiencies can be seen on the testing performed by the eye doctors. The parties agree that Muellenberg has not driven on a highway in more than five years and that her reports of how the injury has affected her life are accurate. There is no dispute that she is telling the truth as Redfield Ace has never attacked her credibility or stated that she was lying, faking, exaggerating or malingering.

The only dispute is how to apply Muellenberg's inability to drive to SDCL 62-4-53. Redfield Ace's position is that work restrictions are required to prove permanent total disability benefits and without them, she per se cannot qualify for benefits. Muellenberg's position is that they are not required as the Court is required to consider a broader picture of the injured worker's "physical condition." As Muellenberg's position is correct based on the statutes and case law, this Court must reverse the Department and find that she qualifies for permanent total disability benefits.

I. FORMAL WORK RESTRICTIONS ARE NOT REQUIRED TO PROVE PERMANENT TOTAL DISABILITY BASED ON THE PLAIN LANGUAGE OF SDCL 62-4-53.

This case requires this Court to analyze and give effect to the plain language of SDCL 62-4-53, which provides the criteria for an injured worker's eligibility for permanent total disability benefits under South Dakota law.

"SDCL 62-4-53 governs whether a person is entitled to odd-lot disability benefits, also known as total and permanent disability benefits." *Billman*, 2021 S.D. 18, ¶ 24, 956 N.W.2d at 819. The statute provides:

An employee is permanently totally disabled if the employee's *physical condition*, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

SDCL 62-4-53 (emphasis added). Per the statute, the five factors used to analyze eligibility for permanent total disability benefits are: (1) physical condition; (2) age; (3) training; (4) experience; and (5) type of work available

in the employee's community. As the parties mostly agree on the other factors, the crux of this case is how this Court will define and analyze the "physical condition" factor in SDCL 62-4-53.

a. Physical condition is broader than work restrictions.

In a one-paragraph analysis, the Department based its rejection of Muellenberg's claim solely on the unremarkable observation that her medical providers had not placed formal medical restrictions on her driving. (R. 1215). But that analysis ignored the true question and sidestepped the proper statutory inquiry, which must be based on the claimant's actual "physical condition," rather than labels. Contrary to the holding by the Department, nothing in SDCL 62-4-53 requires that an injured worker be assigned work restrictions in order to qualify for permanent total disability benefits. Not only does the plain language of the statute make it clear that the standard is "physical condition," there are no cases that support such a ruling.

The Department failed when it dismissed the objective medical findings of Muellenberg's permanent eye defects and deficiencies and her testimony regarding her limitations and symptoms. In contradiction to the statutes and case law, the Department's focus was solely based on work restrictions. Redfield Ace's argument, which was adopted by the Department, was that "physical condition" and "work restrictions" are synonymous and if an injured worker does not have work restrictions, then

the injured worker automatically cannot receive permanent total disability benefits. The argument is that the analysis simply ends because no work restrictions were assigned. That argument is wrong based on the plain language of SDCL 62-4-53 and the decisional case law that has followed the enactment of the statute.

This Court has repeatedly analyzed permanent total disability benefits by taking into consideration the entirety of an injured worker's physical condition, not just the work-related injury. In *Billman*, 2021 S.D. 18, ¶ 31, 956 N.W.2d at 821, this Court specifically analyzed and adopted the claimant's subjective reports of his limitations and abilities, which were much more limiting than his doctor-assigned work restrictions. *Id.* This Court also noted the claimant's other health conditions such as high cholesterol, hypothyroidism, and diabetes as part of the analysis for permanent total disability benefits. *Id.* In reversing the Department's denial of permanent total disability benefits, this Court noted that "[t]he Department failed to examine Billman's situation in the aggregate." *Id.* at ¶ 41, 822. Billman was only one year older than Muellenberg is now, testified to significant limitations that the Department ignored and his outdated computer skills. Based on all the factors set forth in SDCL 62-4-53, Billman was awarded benefits. *Id.* at ¶ 53, 826.

This same analysis was employed in *Kurtz v. SCI*, 1998 S.D. 37, 576 N.W.2d 878. In analyzing SDCL 62-4-53, this Court stated "[t]he claimant's

physical condition is key under either method of proving a prima facie case for odd-lot disability.” *Id.* at ¶ 16, 884. The analysis is then focused on the claimant’s testimony of what she could and could not do based on her injury including problems with pain, gripping, repetitive motion, and the inability to weed her garden, mow her lawn or bowl. *Id.* In finding that she qualified for permanent total disability benefits, this Court specifically considered the claimant’s testimony regarding her limitations. *Id.*

In *Engel v. Prostrullo Motors*, 2003 S.D. 2, 656 N.W.2d 299, this Court again found that the claimant qualified for permanent total disability benefits even though no doctor had ever opined that the claimant could not work. *Id.* at ¶ 14. Similar to this case, the employer “argue[d] that the hearing examiner’s decision betray[ed] a fundamental misunderstanding of the odd-lot doctrine because no South Dakota case has ever accepted a claim for odd-lot status when medical evidence shows a claimant can work.” *Id.* at ¶ 19. This Court rejected that position and found that the claimant proved eligibility for benefits as she had been unable to secure employment.

Although *Engel* is a pain case, the proposition still applies – an injured worker can qualify for permanent total disability benefits even if no doctor has opined that the worker is unable to secure employment. Akin to a totality-of-the-circumstances test, this whole-person analysis should have been applied in Muellenberg’s case.

b. It is undisputed that Muellenberg suffered serious, permanent damage to her eye which has resulted in objective defects and deficiencies.

The Department erred when it improperly limited its analysis to work restrictions when the evidence and testimony undisputedly proves Muellenberg's eye was permanently damaged as shown by the testing performed by her treating physicians and as testified to by Muellenberg. Dr. Ringeisen testified his examination and testing showed "significant deficiencies" in Muellenberg's peripheral vision causing tunnel vision, vision loss, swelling, pain and damage to the optic nerve. (Ex. 5, R. 1036-1044, p. 14-22). These defects were verified by Dr. Martin, who noted abnormalities and permanent defects of the left eye. Dr. Martin's physical examination revealed "[t]he left pupil is abnormal and triangular in shape. There are obvious areas of operative intervention noted around the iris periphery." (R. 127). He also noted "[a] screening machine vision tester assessment today indicates that the best visual acuity that we are able to obtain with the left eye today is 20/70. She [has] struggled with regards to phoria testing as well as screening visual field examination." (R. 127). His prognosis for her was fair. (R. 128).

When asked about her current objective and subjective findings, Dr. Martin stated:

Her subjective findings are primarily with regards to visual acuity disturbances in the left eye both concerning actual true acuity but also some visual field issues. She has some complaints of a pulling sensation in the left eye with white fine

scotomas. For her objective findings I would refer you to the physical examination section.³

(R. 129). In response to Redfield Ace's inquiry about causation, Dr. Martin stated the injury was "a major contributing cause for a left traumatic cataract and left traumatic glaucoma situation... She remains with what appears to be both visual field and visual acuity trouble spot which has relationship to this." (R. 129). Dr. Martin noted that the Humphrey plot test confirmed what is undisputed and obvious – Muellenberg had permanent eye damage with lifelong residual effects. (R. 148) ("There were visual field abnormalities of the left eye, as described within the Humphrey plot."). He also assigned her a 9% whole body impairment rating based on the deficiencies in Muellenberg's left eye. (R. 148).

These objective findings are vital to the analysis – yet were ignored by the Department. This is not a case where all objective findings were normal, but the claimant subjectively reported issues and the Department is tasked with determining whether the claimant is lying, faking, exaggerating or malingering despite the normal objective findings. Instead, this case involves clear objective medical findings that show that Muellenberg suffered a permanent eye injury that resulted in life altering changes to her vision and, subsequently, to all other aspects of her life. This medical evidence and testimony was required to be part of the Department's "physical condition"

³ The physical examination section includes the references to abnormal pupil and the testing that showed defects and deficiencies. (R. 127).

analysis.

c. It is undisputed that every part of Muellenberg's life has been affected by the damage to her eye.

As the Department failed to properly consider that physical condition involved more than just work restrictions, the Department did not properly consider Muellenberg's testimony regarding her limitations related to the injury. These limitations include:

- A pulling sensation in her eyes which requires her to rest her eyes "several" times a day, sometimes up to thirty minutes at a time. (H.T. 37, 53).
- Pain, swelling and inflammation requiring daily or regular medication. (H.T. 41-43).
- Trouble reading. (H.T. 38).
- Trouble using a keyboard as she cannot find the right key and has trouble appreciating how far or close objects are to her. (H.T. 40).
- Fluctuating eye pressures which cause her pain. (H.T. 35).
- Tunnel vision. (H.T. 45).
- No peripheral vision to her left. (H.T. 45).
- Inability to accurately assess and judge distance between objects. (H.T. 46, 49).
- Inability to accurately judge the speed of objects or rate of travel. (H.T. 46, 50).
- Inability to accurately assess object permanency. (H.T. 46-47).

Contrary to the Department's ruling, Muellenberg's testimony regarding what she endures on a daily basis matters, especially when she was implicitly

found to be a credible witness.⁴ There is no evidence that her testimony was not an accurate and truthful depiction of what she experiences and her limitations.

As the objective medical testing and Muellenberg's testimony confirms, she has serious limitations that affect both her personal and professional life. Redfield Ace presented zero evidence to refute these serious concerns regarding Muellenberg's actual physical condition and limitations. Rather, it was solely the absence of a written "do not drive" restriction entered in the medical records that warranted the denial of benefits. The Department's myopic focus on work restrictions was contradictory to the plain language of the statutes and case law.

II. MUELLENBERG IS PERMANENTLY AND TOTALLY DISABLED UNDER THE LAW AND THE DEPARTMENT CLEARLY ERRED IN HOLDING OTHERWISE.

As the Department committed clear error in denying benefits based on a faulty reading of the statutes and case law, its decision must be reversed and Muellenberg should receive permanent total disability benefits. As shown by the full evidence and testimony, Muellenberg proved that she qualifies for permanent total disability benefits pursuant to SDCL 62-4-53.

⁴ There are no findings of fact or conclusions of law addressing Muellenberg's credibility. The absence is very telling. Had the Department not believed Muellenberg or found that she was lying, faking, exaggerating or malingering, that would be reflected in the Department's written decision and findings and conclusions. There are none.

An employee has the burden of proof to make a prima facie showing of permanent total disability. SDCL 62-4-53. A claimant “presents a prima facie showing of permanent total disability under the statute by presenting evidence: ‘(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training and experience,[] or (2) [of the] unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful.’” *Baker*, 2022 S.D. 40, ¶ 31, 978 N.W.2d at 378 (quoting *Billman*, 2021 S.D. 18, ¶ 25, 956 N.W.2d at 820). This burden simply requires a claimant to present “evidence *which if unanswered* would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.” *Baker*, 2022 S.D. 40, ¶ 38, 978 N.W.2d at 380 (quoting *Sandner v. Minnehaha County*, 2002 S.D. 123, ¶ 13, 652 N.W.2d 778, 783).

If a claimant makes a prima facie showing, the burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. *See* SDCL 62-4-53; *Baker*, 2022 S.D. 40, ¶ 31, 978 N.W.2d at 378. Alternatively, if a claimant is unable to show obvious unemployability, the claimant must present evidence of the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. *See id.* at 378-79. The burden will only shift to the employer in this second alternative when the claimant produces substantial evidence that he is not employable in the

competitive market. *Id.* Then, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. *Id.* Although the burden may shift amongst parties, “the ultimate burden of persuasion remains with the claimant.” *Id.*

a. Linda Muellenberg is obviously unemployable under both avenues of establishing a prima facie case.

Muellenberg met her prima facie showing of odd-lot disability inclusion that she is obviously unemployable pursuant to both avenues. Under the first avenue for making a prima facie showing of odd-lot disability inclusion, a claimant must show her physical condition, coupled with her age, training, experience and type of work available, make it obvious that she is in the odd-lot disability category. *See Billman*, 2021 S.D. 18, ¶ 25, 965 N.W.2d at 820; *Eite*, 2007 S.D. 95, ¶21, 739 N.W.2d at 270-71; *Shepherd v. Moorman Manufacturing*, 467 N.W.2d 916, 917-20 (S.D. 1991). These factors may not be looked at individually as in separate evidentiary silos; rather, the Department must take a holistic approach to the claimant’s condition, viewing all of these factors in the aggregate and in combination with each other, as each factor affects the severity of the others. *Billman*, 2021 S.D. 18, ¶ 37, 965 N.W.2d at 822.

By correctly applying the factors set forth in SDCL 62-4-53, Muellenberg meets the statutory definition of odd-lot disability due to a combination of her age (63 years old), education (high school diploma plus an expired LPN license), training and experience (recent history of being a sales

cashier and working on a sales floor) and the type of work available in her community have caused her to be unable to secure anything more than sporadic employment resulting in insubstantial income. She has swelling, pain, high pressure in her eye, diminished vision, tunnel vision and poor depth perception that greatly inhibits her ability to see clearly and therefore to operate a vehicle safely, except for short distances on sparsely traveled roads. As she testified extensively and as confirmed by all other witnesses, Muellenberg falls into the odd lot category because she cannot get herself, routinely, to a place of employment in another town that is too far from her home for her to safely navigate. And even if she were able to drive, her other residual issues with pain, swelling, inflammation and needing to rest her eyes continuously throughout the day rendered her obviously unemployable.

Muellenberg also qualifies for benefits under the second avenue, proving unavailability of suitable employment by showing that she has made reasonable efforts to find work and was unsuccessful, for the same reasons as outlined above. As vocational expert Audet confirmed, Muellenberg's inability to safely drive anything other than short distances on rural gravel roads made it impossible for her to find available suitable work within the area in which she was able to safely drive. The damage to her eye and the impact of that damage on her daily life renders her unable to be hired and maintain employment. As such, Muellenberg met her prima facie showing of odd-lot disability pursuant to SDCL 62-4-53.

b. Redfield Ace failed to demonstrate that there was suitable employment within Muellenberg's physical limitations available in her community.

If the claimant shows she is obviously unemployable, the burden of the production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. *See Baker*, 2022 S.D. 40, ¶ 33, 978 N.W.2d at 378; *Billman*, 2021 S.D. 18, ¶ 25, 965 N.W.2d at 820; *Eite*, 2007 S.D. 95, ¶ 21, 739 N.W.2d at 270-71. While it is not required that an employer actually place a claimant in an open job position, more than the mere possibility of employment must be shown; the employer must establish that there are positions actually open and available. *See Billman*, 2021 S.D. 18, ¶¶ 43, 48, 965 N.W.2d at 823-25; *Capital Motors, LLC v. Scheid*, 2003 S.D. 33, ¶ 12, 660 N.W.2d 242, 247; *Johnson v. Powder River Transp.*, 2002 S.D. 23, ¶ 21, 640 N.W.2d 739, 744; *Spitzack v. Berg Corp.*, 532 N.W.2d 72, 76 (S.D. 1995).

The employer may meet this burden by showing that a position is available which is not sporadic, resulting in an insubstantial income as defined in SDCL 62-4-52(2). *Billman*, 2021 S.D. 18, ¶ 43, 965 N.W.2d at 823; SDCL 62-4-53. Sporadic employment is employment that does not offer an employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury. *Billman*, 2021 S.D. 18, ¶ 43, 965 N.W.2d at 823; SDCL 62-4-52. The work must be

available in the claimant's community, which is the area within sixty road miles of the employee's residence unless: (a) the employee is physically limited to travel within a lesser distance; or (b) consideration of the wages available within sixty road miles and the cost of commuting makes it financially infeasible to work within such a distance. *Billman*, 2021 S.D. 18, ¶ 43, 965 N.W.2d at 823; SDCL 62-4-52. The Department is authorized to reduce a claimant's sixty-mile radius due to physical limitations or wages available compared to the costs of commuting. *Billman*, 2021 S.D. 18, ¶ 47, 965 N.W.2d at 824; SDCL 62-4-52(1)(a)-(b).

Here, the Department compounded its previous error by adopting the deposition opinions of Redfield Ace's vocational witness, which did not consider Muellenberg's visual impairment and inability to drive anything other than short distances on sparsely traveled roads. The Department erred in holding that the Muellenberg's serious visual impairment did not make her "physically limited to travel within a lesser distance" than sixty road miles under SDCL 62-4-52(a). Rather than reducing the distance within which suitable work must be located, the Department accepted Redfield Ace's argument that despite her visual impairment and the danger it poses to her and others on the public highways, Muellenberg should be considered completely able and safe to be required to drive up to sixty miles in highway traffic back and forth to work every day as a condition of receiving worker's compensation benefits for her workplace injury. This was legal error.

Muellenberg cannot reasonably get herself to work and it is not economically feasible for her to have a driver. Muellenberg has had to radically alter her life as the result of her not being able to safely drive more than a few miles since the date of her injury more than five years ago. She used to routinely drive herself to work and drive long distances. The inability to safely drive to any job identified by Redfield Ace has been consistently supported by the medical records and her testimony regarding her symptoms.

In addition to her inability to drive, the undisputed medical evidence shows that Muellenberg needs to take breaks often to close her eyes for a rest because of the increased pressure and edema that causes pain in her eye. In order to stop the pressure, edema and resultant nausea, Muellenberg has to close her eyes and rest several times per day. (H.T. 35-41). Given Muellenberg's recent work history and experience working on sales floors, her need to close her eyes does not lend itself to being able to find and maintain regular employment.

None of this undisputed evidence and testimony was taken into consideration by Kollars. An expert's listing of jobs that focuses on a claimant's capabilities to the exclusion of his limitations is insufficient as a matter of law. *See Arneson v. GR Management, LLC*, 2024 S.D. 61, ¶ 59, 13 N.W.3d 206, 223; *Billman*, 2021 S.D. 18, ¶ 49, 965 N.W.2d at 825; *Eite*, 2007 S.D. 95, ¶ 28, 739 N.W.2d at 273. When prospective employers are not informed of the nature of the limitations they need to accommodate, there is

no basis for an expert's opinion in concluding that the employers were willing to make modifications to meet those limitations. *See Arneson*, 2024 S.D. 61, ¶ 59, 13 N.W.3d at 223; *Billman*, 2021 S.D. 18, ¶ 49, 965 N.W.2d at 825; *Eite*, 2007 S.D. 95, ¶ 28, 739 N.W.2d at 273. Kollar's job search focused only on Muellenberg's capabilities to the exclusion of her limitations. Kollars did not consider Muellenberg's inability to safely drive on highways even though he conceded that some people with tunnel vision may struggle to feel safe when driving. (R. 1125, p. 29). He also admitted that a person experiencing difficulty seeing a keyboard or computer screen would affect a person's ability to perform a variety of jobs. (R. 1125, p. 31). He further admitted that jobs such as a Subway sandwich artist would be impossible for someone who had vision issues when looking down as experienced by Muellenberg. (R. 1125, p. 31). He also testified that he did not inform any potential employers that Muellenberg had tunnel vision or significant problems with peripheral vision. (R. 1123, p. 24). Instead, he focused on the lack of formal work restrictions to the exclusion of all of the medical evidence and Muellenberg's physical limitations. (R. 1123, p. 31-33).

Kollars failed to consider Muellenberg's limitations. As a result, Redfield Ace clearly failed to meet its "burden of producing evidence showing that suitable employment is regularly and continuously available for individuals with [Muellenberg's] limitations in h[er] community" under any of the legal standards set forth above. *Billman*, 2021 S.D. 18, ¶ 51, 965 N.W.2d

at 826. By ignoring Muellenberg's permanent damage to her eye and the inability to safely drive, the Department's decision is erroneous and must be reversed. Muellenberg's eye injury rendered her unable to obtain and maintain meaningful employment. She struggles every day with the residual issues from the injury and no jobs identified by Kollars met Redfield Ace's burden. As such, Muellenberg qualifies for permanent total disability benefits.

CONCLUSION

Linda Muellenberg suffered a permanent, life altering injury to her eye that has and will continue to affect every facet of her life. The purpose of the workers' compensation system is to provide support to injured workers and their families when they are unable to earn wages because of their work injuries. That is exactly what happened here. Linda Muellenberg qualifies for permanent total disability benefits and should be awarded benefits.

WHEREFORE, Linda Muellenberg respectfully requests that this Honorable Court *reverse* the Department's final order and the Circuit Court's order affirming it, and remand with instructions to grant her petition for permanent total disability benefits.

Respectfully submitted this 14th day of April, 2026.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,108 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT and the APPENDIX were served via Odyssey File and Serve upon the following:

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on this 14th day of April, 2026.

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Jami J. Bishop

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31386

LINDA MUELLENBERG, Claimant and Appellant,
v.
REDFIELD ACE HARDWARE BDB INVESTMENT ENTERPRISES and FIRST
DAKOTA INDEMNITY COMPANY, Employer and Insurer and Appellees.

APPELLEE'S BRIEF

Appeal from the Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable Margo D. Northrup

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NOTICE OF APPEAL FILED on February 12, 2026

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PRELIMINARY STATEMENT

Appellant Linda Muellenberg shall be referred to as “Muellenberg.” Appellee Redfield Ace Hardware BDB Investment Enterprises shall be referred to as “Employer.” Appellee First Dakota Indemnity Company shall be referred to as “Insurer.” The South Dakota Department of Labor and Regulation shall be referred to as the “Department.” The Department’s Decision dated January 13, 2025, dismissing Muellenberg’s Petition for Hearing, shall be referred to as the “Decision.” The South Dakota Circuit Court, Sixth Judicial Circuit, Honorable Margo Northrup, shall be referred to as the “Circuit Court.” Citations to the settled record submitted by the Circuit Court shall be referred to as “R” followed by the corresponding page number.

JURISDICTIONAL STATEMENT

Muellenberg seeks reversal of the Department’s Decision dated January 13, 2025, in which the Department denied Muellenberg’s request for odd-lot disability benefits. Muellenberg timely filed her Notice of Appeal of the Decision on April 10, 2025. (R 1257). On January 27, 2026, the Circuit Court issued an Order Affirming the Decision. (R 1367). Muellenberg timely filed a Notice of Appeal of the Circuit Court’s order on February 12, 2026. (R 1371). This Court has jurisdiction over that appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

The issue is whether the Department clearly erred in finding that Muellenberg was not permanently and totally disabled. The public policy at issue is whether an injured worker is allowed to pick their own work restrictions. It is undisputed that Muellenberg was given no work restrictions by any medical provider and was legally allowed to drive.

However, Muellenberg argued she could not drive on state highways (she drove on gravel roads) because it was unsafe, and her self-diagnosed inability to drive on state highways rendered her permanently and totally disabled. The Department found that Muellenberg did not establish entitlement to permanent and total disability benefits based on her subjective, self-imposed work restrictions and dismissed Muellenberg’s Petition for Hearing. The Circuit Court affirmed.

- SDCL 62-4-53
- *Billman v. Clarke Mach., Inc.*, 2021 SD 18, 956 N.W.2d 812

STATEMENT OF THE CASE

On October 24, 2022, Muellenberg brought a Petition for Hearing before the Department, the Honorable Michelle Faw presiding, arguing she was entitled to odd-lot disability benefits. (R 42–43). The Department held a hearing on the Petition, after which the Department issued its Decision finding that Muellenberg was not permanently and totally disabled. (R 1212–18). Muellenberg appealed to the Circuit Court, the Honorable Margo Northrup presiding, and the Circuit Court affirmed the Decision. (R 1359–66). Muellenberg now appeals to the South Dakota Supreme Court seeking reversal of the Decision. (R 1371).

STATEMENT OF FACTS

A. Muellenberg’s background and medical history

Muellenberg is sixty-three years old. (R 182). She lives in Zell, South Dakota, with her husband of over thirty years, Roger Muellenberg (“Roger”). (R 182). Zell has about 20 residents. (R 272). It is located about 5 miles from Rockham, South Dakota, 10 miles from Redfield, South Dakota, and 50 miles from Aberdeen, South Dakota. (R 183, 240, 1124). Redfield has about 2,200 people. (R 254). Muellenberg and Roger routinely

travel from Zell to Redfield and Aberdeen for work, groceries, and medical care. (*See* R 271–72).

Muellenberg worked as a licensed practical nurse for several decades. (R 183). After she retired from nursing, she worked at a feed store in Rockham, South Dakota, for several years before taking a job as sales manager at Shopko in Redfield, South Dakota, in 2016. (R 183–84). After working nine months at Shopko, Muellenberg took a full-time job with Employer, an Ace Hardware, in Redfield, South Dakota. (R 186). For Employer, Muellenberg provided customer service, cashiering, and other odd jobs. (R 186–89).

On December 3, 2020, Muellenberg was unloading merchandise in the plumbing room of the store. (R 190). In that room, there was a bungee cord holding PVC pipe against the wall. (R 190–91). As Muellenberg was unloading merchandise in the plumbing room, the bungee cord became untethered and struck Muellenberg in her left eyeball (the “Work Injury”). (R 190–91). Muellenberg immediately felt severe pain and went to the emergency room for treatment. (R 198–99).

The attending physician referred Muellenberg to an optometrist, Dr. Tyler Heuer (“Dr. Heuer”), at Ophthalmology Associates in Aberdeen. (R 199, 625). Dr. Heuer saw Muellenberg that same day and diagnosed her with hyphema to her left eye. (R 627). Dr. Heuer recommended eye drops, bed rest, and for a follow-up appointment. (R 627).

The next day, Muellenberg returned to the emergency room and reported blurry vision in her left eye. (R 436). Muellenberg was given eye drops, pain reliever, and was referred again to Ophthalmology Associates in Aberdeen. (R 437–38). Muellenberg continued to see Dr. Heuer over the following days and months. (R 628–55). On January 13, 2021, Dr. John Bormes, an associate of Dr. Heuer, referred Muellenberg to Dr. Dustin

Dierks (“Dr. Dierks”), in Sioux Falls as Muellenberg’s condition did not improve. (R 659–661, 728).

Muellenberg saw Dr. Dierks on January 28, 2021. (R 728). Dr. Dierks diagnosed Muellenberg with a traumatic cataract in her left eye. (R 731). He referred Muellenberg to another eye specialist in Minnesota, Dr. David Hardten (“Dr. Hardten”), for a complex traumatic cataract surgery and removed her from work. (R 575, 731, 734).

Dr. Hardten saw Muellenberg on February 5, 2021. (R 576). Dr. Hardten removed Muellenberg from work and recommended she undergo cataract surgery on her left eye. (R 579–82). Muellenberg was scheduled for left eye surgery on April 6, 2021. (R 588). On March 22, 2021, Dr. Hardten removed Muellenberg’s work restrictions but stated Muellenberg would have restrictions after the surgery. (R 590). Dr. Hardten removed a traumatic cataract, performed glaucoma surgery, and placed an intraocular lens in Muellenberg’s left eye. (R 125, 594). Dr. Hardten also inserted a shunt in Muellenberg’s left eye to remove fluid and relieve eye pressure. (R 1078).

By May 17, 2021, Muellenberg’s vision had “stabled off” and her left eye was starting to feel normal. (R 751). Muellenberg also felt comfortable returning to work. (R 751). Dr. Dierks released Muellenberg to work full-time. (R 753). Muellenberg never returned to work after the Work Injury and did not seek any work for three years after the Work Injury. (R 237–39).

In October 2021, Muellenberg began seeing ophthalmologist Dr. Alex Ringeisen (“Dr. Ringeisen”) for follow-up care at Ophthalmology Associates in Aberdeen. (R 674–704). Over the following months and years, Muellenberg’s condition was stable, although she continued to take eyedrops. (R 674–704). Eventually, Muellenberg’s vision in her left

eye stabilized at 20/40 corrected, while her corrected vision in her right eye was 20/20. (R 268, 1074).

On September 2, 2022, Muellenberg informed her treating provider, Dr. Alex Falk (“Dr. Falk”), that she was driving but was very careful doing it. (R 939). On October 24, 2022, Muellenberg filed a Petition for Hearing alleging she was permanently and totally disabled. (R 42–43). On July 12, 2023, Dr. Ringeisen noted that Muellenberg was almost at maximum medical improvement (“MMI”) for the Work Injury. (R 705).

B. Dr. Douglas Martin’s IME

On December 12, 2023, Muellenberg saw Dr. Douglas Martin (“Dr. Martin”) for an Independent Medical Exam (“IME”). (R 101). Dr. Martin is an accomplished occupational and family medicine doctor. He obtained his Doctor of Medicine from the University of Nebraska-Omaha in 1991. (R 115). Dr. Martin then completed his residency in family medicine at Genesis Family Medicine Residency Program in Davenport, Iowa, from 1991–1994. (R 114). He completed a residency in occupational medicine at the University of Cincinnati from 1993–1994. (R 114).

After completing his residencies, Dr. Martin worked as a staff physician and medical director at several occupational medicine clinics in North Sioux City, South Dakota, until 1999, when he founded Martin Occupational Medicine PC in Dakota Dunes, South Dakota. (R 114). From 1999 to 2022, Dr. Martin also served as Medical Director of Occupational Medicine at UnityPoint Health in Sioux City, Iowa. (R 113). Since 2023, he has served as the Medical Director of Occupational Medicine at CNOS in Dakota Dunes, South Dakota. (R 113).

Dr. Martin is a member of the American Academy of Family Physicians and the

International Academy of Independent Medical Evaluators. (R 115–16). He regularly publishes in the fields of occupational and family medicine. (R 119–20). In his over 30-year career, Dr. Martin has seen many private patients in his family medicine practice and has performed many IMEs. (R 112).

Dr. Martin examined Muellenberg and reviewed her medical records. (R 101–02). Muellenberg wore eyeglasses but informed Dr. Martin that she “gets along reasonably well in regards to vision.” (R 103). However, Muellenberg reported a “pulling sensation” in her left eye and occasional headaches. (R 102, 106). Muellenberg did not report any issues reading, looking at a computer screen, or needing to “rest” her eyes to Dr. Martin or any of her other medical providers. (R 101–07, 391–1049).

In examining Muellenberg’s left eye, Dr. Martin noted that her left pupil was abnormal and had obvious signs of an operative intervention. (R 104). Muellenberg’s visual acuity was 20/70 in her left eye, while Muellenberg’s right eye was unaffected by the Work Injury. (R 104–05).

Dr. Martin did not recommend any further treatment for Muellenberg and placed her at MMI. (R 105, 107). He noted that Muellenberg will likely need eyedrops for the rest of her life. (R 105). Dr. Martin imposed no work restrictions and stated there was no medical reason why Muellenberg could not drive. (R 107). He explained: “I have had a large number of patients who have had partial vision in one eye who are able to drive both personal vehicles and commercial vehicles.” (R 107).

C. Dr. Alex Ringeisen’s testimony and opinions

Muellenberg retained Dr. Ringeisen, her treating provider, as her medical expert. (R 81). Dr. Ringeisen was deposed on January 25, 2024. (R 1065).

Since 2022, Dr. Ringeisen has worked as an associate physician at the Saint Paul Eye Clinic in Woodbury, Minnesota. (R 1100). Since 2021, he has also traveled to Ophthalmology Associates in Aberdeen once a month to see patients. (R 1068, 1100). Through his travels to Aberdeen, Dr. Ringeisen met Muellenberg in October 2021. (R 1069). Dr. Ringeisen treated Muellenberg between October 2021 and August 2023. (R 674–704, 1069, 1079).

When Dr. Ringeisen first saw Muellenberg in October 2021, he treated her for “cystoid macular edema” or retinal swelling. (R 1074). At that time, Muellenberg had corrected 20/20 vision in her right eye and 20/40 vision in her left eye. (R 1074). Under South Dakota law, a resident can obtain a driver’s license if that resident has visual acuity of “20/40 or better with both eyes” or “no worse than 20/50 in either eye with correction.” ARSD 61:06:01:07. Muellenberg’s vision was within those parameters. *See id.*

Dr. Ringeisen believed swelling caused Muellenberg’s decreased visual acuity in her left eye. (R 1076). Dr. Ringeisen also opined that Muellenberg may have limited peripheral vision due to scarring from her glaucoma surgery, but he was not sure to what extent. (R 1078–79). He explained this possible lack of peripheral vision could cause a “bit of a tunnel vision effect” in Muellenberg’s left eye. (R 1079).

Nonetheless, Dr. Ringeisen agreed that Muellenberg’s vision did not disqualify her from driving. (R 1074–75). Muellenberg’s condition remained stable while she saw Dr. Ringeisen from October 2021 to August 2023. (R 1079). Dr. Ringeisen agreed with Dr. Martin that Muellenberg was at MMI for the Work Injury. (R 1081).

Dr. Ringeisen routinely provides work restrictions in his practice. (R 1085).

Although Dr. Ringeisen routinely imposes work restrictions, and agreed Muellenberg had some visual limitations, he, like Dr. Martin, refused to impose any work restrictions on Muellenberg. (R 1085–90). At most, Dr. Ringeisen only agreed that work restrictions were proper during Muellenberg’s acute injury and post-surgical recovery phases. (R 1085–90).

Dr. Ringeisen deferred to Dr Martin’s opinion that Muellenberg had no work restrictions. (R 1089–90). Like Dr. Martin, Dr. Ringeisen testified that there was no medical reason why Muellenberg could not drive. (R 1085–90). And, like Dr. Martin, Dr. Ringeisen agreed that patients who can only see with one eye can drive. (R 1085–90). Finally, Dr. Ringeisen agreed that Muellenberg could try to drive with an eye patch over her left eye to see if that alleviated her concerns about driving. (R 1085–90).

D. Chad Kollars’s testimony and opinions

Employer and Insurer disclosed Chad Kollars (“Kollars”) as their vocational expert. (R 146). Muellenberg disclosed Tom Audet (“Audet”) as her vocational expert. (R 87). Kollars was deposed on July 3, 2024. (R 1117).

Kollars is a certified rehabilitation consultant. (R 1118, 1134). He has a Master of Science degree in Rehabilitation and Mental Health Counseling from Montana State University – Billings. (R 1134). Kollars has worked as a vocational consultant for over 20 years. (R 1118, 1134). From 2003 to 2019, Kollars worked for the South Dakota Department of Human Services. (R 1118, 1134). In 2020, he opened his own business, Kollars Consulting. (R 1118, 1134). At Kollars Consulting, Kollars provides vocational assessments for Social Security and workers’ compensation claimants. (R 1118–19, 1134). Kollars has performed vocational assessments for both workers’ compensation

claimants and for employers and insurers. (R 1119).

Kollars reviewed Dr. Ringeisen's deposition, Muellenberg's deposition, Dr. Martin's IME, Muellenberg's medical records, and Audet's vocational expert report, among other materials. (R 1120, 1136). Kollars also specifically considered Muellenberg's testimony that she did not feel comfortable driving but would drive in rural areas. (R 1120). Kollars was aware that Muellenberg had no work restrictions and that her treating doctor, Dr. Ringeisen, had testified that there was no reason why she could not drive. (R 1120, 1142, 1183–84). Nonetheless, based on Muellenberg's discomfort driving, Kollars limited his labor market survey to Redfield, so Muellenberg would not have to drive far and would only need to drive in rural areas. (R 1120).

After reviewing the materials and performing a labor market survey, Kollars opined that Muellenberg could return to her job for Employer or any other jobs in her work history. (R 1120, 1142). Muellenberg already had the skills for those jobs. (*See* R 1120, 1142). Because she had no work restrictions and retained the skills from her previous jobs, Kollars opined that Muellenberg could successfully return to those jobs. (*See* R 1120, 1142).

Through his labor market survey, Kollars identified additional jobs in Redfield that were available to Muellenberg, for which she was qualified, and that would pay her above her workers' compensation rate. (R 1120–22, 1143–44). These jobs were at Subway, at Cura as a food service worker, and at Avantara Redfield, a nursing home, as an aide. (R 1120–22, 1143–44). Again, Kollars limited his search to Redfield because he knew Muellenberg was uncomfortable driving long distances. (R 1122). Kollars stated, however, that if he expanded his job search to Aberdeen and surrounding towns, there

would be more positions available for which Muellenberg was qualified and that would pay at or above her workers' compensation rate. (R 1122).

Kollars contacted Subway in Redfield and disclosed that Muellenberg had visual limitations in one eye but did not have work restrictions. (R 1120–22). Subway advised that Muellenberg would have no difficulties working there. (R 1120–22). Kollars also contacted Aventura Redfield and advised it of Muellenberg's visual limitations. (R 1120–21). Aventura Redfield advised that Muellenberg would be able to work there and that it would work with Muellenberg's visual limitations. (R 1120–21).

Based on his assessment, Kollars concluded that Muellenberg was not obviously unemployable. (R 1122–23). A job search would not be futile, and there were suitable employment opportunities for Muellenberg. (R 1122–23).

E. Hearing testimony

1. Muellenberg's, Roger's, and Jenny Uhlich's hearing testimony

A hearing was held before the Department on July 10, 2024. (R 178).

Muellenberg, her husband Roger, and Muellenberg's sister, Jenny Uhlich ("Jenny"), testified. (R 179). Muellenberg called Audet, her vocational expert, live. (R 179). Dr. Martin's IME, Dr. Ringeisen's deposition, and Kollars's deposition were submitted as evidence. (R 180–81).

At the hearing, Muellenberg acknowledged that she did not have work restrictions and was medically approved to drive. (R 246–47). She has a driver's license and drives on gravel roads when she chooses to but exercises caution. (R 222, 252). Since the Work Injury, Muellenberg testified that she not driven any farther than her mother-in-law's house 5 miles away. (R 225). Although Dr. Ringeisen testified that Muellenberg could

drive with an eye patch over her left eye, Muellenberg admitted she never tried that. (R 247).

Muellenberg's vision in her right eye is 20/20 corrected. (R 1074). Her vision in her left eye is 20/40 corrected. (R 238). Muellenberg stated that she has issues with depth perception and tunnel vision in her left eye. (R 222). Muellenberg denied having any peripheral vision on her left side when looking straight ahead. (R 228–29). Because of her issues with depth perception, Muellenberg makes more messes in the kitchen than she did before the Work Injury.¹ (R 232–33). Muellenberg told her doctors about her issues with peripheral vision. (R 246).

Additionally, since the Work Injury, Muellenberg testified that she needs frequent breaks to rest her eyes after reading or looking at a computer screen. (R 229–30). Three and a half years passed from the Work Injury to the Department's hearing, during which Muellenberg regularly received treatment. (R 178, 192–93). During this three-and-a-half-year period, Muellenberg did not report once to her medical providers that she needed to “rest” her eyes after reading or looking at a computer screen. (R 391–1049).

However, at the hearing, Muellenberg claimed that, after reading or looking at a screen for 5 minutes, she begins to feel a pulling sensation in her left eye. (R 229–31, 233–34). Muellenberg then closes her eyes for 15 to 30 minutes to allow her eyes to rest and recover. (R 229–31, 233–34). In total, Muellenberg typically takes about five or six of these “breaks” to rest her eyes in an eight-hour period.² Muellenberg also claimed she

¹ At the start of the hearing, the door to the hearing room was locked. (R 257–58). Muellenberg unlocked the door to the hearing room without issue. (R 257–58).

² The hearing lasted from 9:00 a.m. to 1:42 p.m., with a 38-minute recess for lunch. (R 180, 390, 364). During the over four-hour hearing, Muellenberg never once took a break to rest her eyes or asked for a break. (*See* R 180–364).

begins to suffer a headache after reading for about 5 minutes. (R 266). None of this testimony is consistent with Muellenberg's extensive medical records. (*See* R 391–1049).

Muellenberg admitted she had not returned to work since the Work Injury. (R 237–39). In the three and a half years between the Work Injury and the hearing, Muellenberg applied to one job – a remote position at Midco – around a month-and-a-half before the hearing. (R 237–38). Muellenberg did not receive an interview for the position. (R 239). Muellenberg admitted she was offered to return to work for Employer but declined. (R 239–40).

2. Tom Audet's hearing testimony

Muellenberg retained Audet as her rehabilitation counselor. (R 87). Audet provides expert vocational testimony at disability hearings for the Social Security Administration and in workers' compensation proceedings. (R 311, 1145). In workers' compensation proceedings, Audet has only testified for claimants. (R 344). He has never provided testimony on behalf of an employer and insurer. (R 344).

Audet performed a vocational analysis of Muellenberg. (R 312). In doing so, he reviewed Muellenberg's medical records and deposition, Kollars's deposition, Dr. Ringeisen's deposition, and spoke with Muellenberg over the phone. (R 312–13).

Audet acknowledged that Muellenberg had no work restrictions. (R 331–32). However, Audet opined that Muellenberg was obviously unemployable and that a job search would be futile based on what Muellenberg told him she was able to do. (R 330, 334). In doing so, Audet disregarded the opinions of Muellenberg's medical providers that Muellenberg could drive and had no work restrictions. (R 330–31, 334). Instead, he accepted Muellenberg's opinion that she could not drive to town or use a computer for

more than a few minutes at a time. (R 330–34).

As to non-remote work, Audet found Muellenberg was not employable because she could not drive to any job within a 60-mile radius. (R 317–18, 328–29, 1054–55). However, Audet admitted that, if Muellenberg was able to drive and had no medical restrictions as her doctors and medical records showed, then Muellenberg was employable. (R 330). Audet further agreed with Kollars that Muellenberg had transferable skills for a variety of jobs. (R 322–23). Assuming Muellenberg was able to obtain employment, Audet stated that “there’s no question [Muellenberg is] going to earn more than the worker’s compensation” rate. (R 324)

Audet testified that Muellenberg could not work remotely based on what Muellenberg told him she was capable of doing. (R 325–26). Again, Audet admitted that Muellenberg had no work restrictions. (R 331). He also admitted that he could not give Muellenberg work restrictions. (R 332). Nonetheless, based on Muellenberg’s subjective, self-reported limitations, Audet assumed Muellenberg would have work restrictions requiring her to rest her eyes for 5 to 30 minutes after using a computer screen for 5 minutes. (*See* R 314, 319–21, 323). Audet stated that remote employers would not hire Muellenberg under these restrictions. (R 325–26). Again, Muellenberg never reported that she needed to rest her eyes to any of her medical providers in the three and a half years between the Work Injury and the hearing. (R 391–1049). Audet did not contact any potential employers to discuss Muellenberg’s qualifications or employment opportunities. (R 343).

F. The Decision and Appeal to the Circuit Court.

On January 13, 2025, the Department issued its Decision finding that Muellenberg was not entitled to odd-lot disability benefits. (R 1218). The Department found that Muellenberg had not made a prima facie showing of obvious unemployability based on the record before it. (R 1212–18). The Department stated: “[w]hile Muellenberg may have symptoms that make her uneasy about driving, her own feeling, without formal restrictions related to her condition, fail to prove she is obviously unemployable.” (R 1216). “[T]o be thorough,” the Department also concluded that Muellenberg had failed to demonstrate the unavailability of suitable employment. In doing so, the Department found that Kollars’s testimony—that there was suitable employment for Muellenberg in Redfield—was more persuasive than Audet’s testimony. (R 1216–18).

Muellenberg timely appealed the Decision to the Circuit Court, which affirmed the Decision. (R 1256–57, 1359–66). The Circuit Court applied a clear error standard of review. (R 1362–63). Under that standard, the Circuit Court affirmed the Department’s finding that Muellenberg failed to present a prima facie case of obviously unemployability and that Employer and Insurer had met their burden of showing available employment. (R 1363–65). The Circuit Court declined to address Muellenberg’s argument on appeal that she was unemployable due to “continuous, severe, and debilitating pain” because that argument was not raised before the Department. (R 1364).

STANDARD OF REVIEW

The South Dakota Supreme Court has repeatedly stated that “[w]hether a claimant is entitled to odd-lot disability benefits is a question of fact subject to review under the

clearly erroneous standard.” *Arneson v. GR Mgmt., LLC*, 2024 SD 61, ¶ 47, 13 N.W.3d 206, 220; *Billman v. Clarke Mach., Inc.*, 2021 SD 18, ¶ 29, 956 N.W.2d 812, 820; *Baier v. Dean Kurtz Const., Inc.*, 2009 SD 7, ¶ 28, 761 N.W.2d 601, 609. Under this standard, the Court must give “great weight to the findings made and inferences drawn [by the Department] on questions of fact” and only reverse those findings if the Court is “definitely and firmly convinced a mistake has been made.” *Baker v. Rapid City Reg’l Hosp.*, 2022 SD 40, ¶ 29, 978 N.W.2d 368, 377–78. “The question is not whether there is substantial evidence contrary to the agency finding, but whether there is substantial evidence to support the agency finding.” *Hendrix v. Graham Tire Co.*, 520 N.W.2d 876, 879 (S.D. 1994). “[S]o long as there is some substantial evidence in the record which supports the Department’s determination, this [C]ourt will affirm.” *Id. see also* SDCL 1-26-36. “Ultimately, the claimant retains the burden of proving all facts essential to compensation.” *Kuhle v. Lecy Chiropractic*, 2006 SD 16, ¶ 16, 711 N.W.2d 244, 247.

Muellenberg asks this Court to apply de novo review to depositions and medical records. (Appellant’s Brief at 22). The Court must reject that argument. This Court has repeatedly stated, and SDCL 1-26-36 provides, that the Department’s factual findings on a claim for odd-lot benefits are reviewed for clear error. Moreover, this Court has recently affirmed that when the Department’s factual findings are supported by both documentary evidence and hearing testimony, as in this case, the clear error standard applies. *Pham v. Smithfield Foods*, 2025 SD 41, ¶ 47, 24 N.W.3d 735, 746.

ARGUMENT

A. The Department did not clearly err in finding Muellenberg was not entitled to odd-lot benefits.

To qualify for odd-lot workers' compensation benefits, a claimant must show that she suffers a temporary or permanent "total disability." *McClaflin v. John Morrell & Co.*, 2001 SD 86, ¶ 7, 631 N.W.2d 180, 183. "An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income." SDCL 62-4-53.

There are several ways a workers' compensation claimant can make a prima facie showing of entitlement to odd-lot benefits. The claimant can show "h[er] physical condition, coupled with h[er] education, training, and age make it obvious that [s]he is in the odd-lot total disability category." *Arneson v. GR Mgmt., LLC*, 2024 SD 61, ¶ 48, 13 N.W.3d 206, 221; *Kassube v. Dakota Logging*, 2005 SD 102, ¶ 34, 705 N.W.2d 461, 468; *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231 (S.D. 1994). Alternatively, a claimant can "persuad[e] the trier of fact that [s]he is in fact in the kind of continuous, severe and debilitating pain which [s]he claims." *Arneson*, 2024 SD 61, ¶ 48, 13 N.W.3d at 221; *Kassube*, 2005 SD 102, ¶ 34, 705 N.W.2d at 468; *Petersen*, 515 N.W.2d at 231. Finally, a claimant can show the "unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful." *Billman v. Clarke Mach., Inc.*, 2021 SD 18, ¶ 25, 956 N.W.2d 812, 820.

Muellenberg argues she has established a prima facie case by the first and third options—that she is unable to find work due to a combination of her physical condition

coupled with her education, training, and age and that she has made reasonable efforts to find work and was unsuccessful. (Appellant’s Brief at 24–34). Muellenberg waived any argument that she is entitled to odd-lot benefits based on severe, debilitating pain because she did not raise that argument before the Department. (R 1364). The Court has recently stated that a factfinder must consider all evidence in the aggregate to determine whether a claimant has made a prima facie showing under SDCL 62-4-53. *Billman*, 2021 SD 18, ¶ 41, 956 N.W.2d at 822.

If a claimant establishes a prima facie case of obvious unemployability, “[t]he burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community.” SDCL 62-4-53. Once the employer presents this evidence, then the “employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile.” SDCL 62-4-53. Under South Dakota law, able-bodied employees are not permitted to leave the labor market and/or place “undue restrictions” on the kind of work they will accept to establish a claim of permanent and total disability. SDCL 62-4-53 states, “[t]he effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market.” SDCL 62-4-53.

1. The Department did not err in finding Muellenberg had failed to present a prima facie case of “obvious unemployability” based on her physical condition, education, training, and age.

The Department did not clearly err when it found that Muellenberg had not shown obvious unemployability based on her physical condition, education, training, and age. It

is undisputed that Muellenberg had the necessary skills, experience, and training to work in Redfield and earn above her workers' compensation rate. (R 322–24, 1122–23).

Muellenberg's assertion that she is obviously unemployable rests solely on her testimony that she cannot drive to work and that she cannot look at a computer screen for more than a few minutes at a time. (R 330–34). At the same time, Muellenberg admitted that she has not attempted to drive with an eye patch and that she drives on gravel roads when she chooses. (R 222, 247, 252). The Department considered that testimony. (R 1214–16).

In addition, the Department noted that Dr. Martin and Dr. Ringeisen opined that Muellenberg could drive and did not have work restrictions. (R 1214–15). Dr. Dierks, Dr. Martin, and Dr. Ringeisen agreed that there was no medical reason why Muellenberg could not drive and work. (R 139, 753, 1085–90). The Department also considered that Muellenberg's eyesight was in the legally acceptable range for driving. (R 1250). The only evidence that Muellenberg could not drive was Muellenberg's subjective opinion. (*See* R 1252).

In weighing this disputed evidence, the Department found that Muellenberg's subjective testimony was insufficient to establish a prima facie case of obvious unemployability. (R 1216). That finding was supported by substantial, objective evidence from Dr. Martin's opinion, Dr. Ringeisen's opinion, and Muellenberg's medical records showing her vision was within the legal limits. (R 139, 753, 1085–90). Under South Dakota law, a resident with visual acuity of "20/40 or better with both eyes" or "no worse than 20/50 in either eye with correction" may obtain a driver's license. ARSD 61:06:01:07. Muellenberg's vision was within those parameters even with decreased

visual acuity in her left eye. (R 1074). As the Department's finding is supported by substantial evidence, there is no clear error. *See Hendrix v. Graham Tire Co.*, 520 N.W.2d 876, 879 (S.D. 1994). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Schneider v. S. Dakota Dep't of Transp.*, 2001 SD 70, ¶ 14, 628 N.W.2d 725, 729.

Muellenberg does not appear to dispute that there is substantial evidence that she was not obviously unemployable. (Appellant's Brief at 24–31). Rather, she argues that the Decision should be reversed because, in reaching the Decision, the Department failed to consider her subjective opinion that she was unable to drive and instead relied solely on her lack of work restrictions from a qualified medical provider. (*Id.* at 25–27).

There is nothing to support this allegation. The Department considered the evidence presented to it, including Muellenberg's live testimony. (R 1212–18, 1243). The Department sat through the hearing, and heard all the evidence, including evidence submitted via exhibit. (R 1243). The Department entered factual findings noting Muellenberg's lack of work restrictions from her employer, *and* Muellenberg's opinion that she could not drive on highways or look at a computer for more than a few minutes. (R 1244, 1246). In its Decision, the Department also expressly acknowledged Muellenberg's testimony but then found that her subjective opinion on her ability to work and drive was insufficient to establish a prima facie case when considering the record. (R 1216). The Department stated, "[w]hile Muellenberg may have symptoms that make her uneasy about driving, her own feeling, without formal restrictions related to her condition, fail to prove she is obviously unemployable." (R 1216).

The Department’s finding—that Muellenberg’s testimony was insufficient to sustain her burden of proof in this case—is also consistent with South Dakota public policy. SDCL 62-1-15 states that, in workers’ compensation proceedings, evidence of an injury “shall be given greater weight is supported by objective medical findings.” SDCL 62-1-15; *see also Vollmer v. Wal-Mart Store, Inc.*, 2007 SD 25, ¶ 25, 729 N.W.2d 377, 385 (affirming this principle). The Department’s assignment of greater weight to the opinion of Muellenberg’s medical providers than Muellenberg on Muellenberg’s physical condition is consistent with South Dakota law, which assigns greater weight to objective evidence. *See* SDCL 62-1-15. As discussed in more detail below, an injured worker also cannot be allowed to pick their own work restrictions inconsistent with medical opinions. Otherwise, every injured worker would be permanently and totally disabled based on their own self-imposed work restrictions.

Additionally, the weight assigned by the Department to Muellenberg’s testimony is entitled to deference. This Court has repeatedly affirmed that “the Department is in the best position to assess the credibility of the witnesses and the weight to be accorded their testimony.” *Loewen v. Hyman Freightways, Inc.*, 1997 SD 2, ¶ 11, 557 N.W.2d 764, 767; *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 235 (S.D. 1994). This Court “will not substitute [its] judgment for the agency’s on an issue of credibility unless [it is] left with a definite and firm conviction that a mistake has been made.” *Loewen*, 1997 SD 2, ¶ 11, 557 N.W.2d at 767. As the objective evidence supports the Department’s finding that Muellenberg was able to drive on highways, contrary to Muellenberg’s testimony, that finding is not clearly erroneous and should be affirmed.

Muellenberg cites *Billman v. Clarke Mach., Inc.*, 2021 SD 18, 956 N.W.2d 812 for the proposition that the Department was required to consider evidence of her physical condition in the aggregate. (Appellant’s Brief at 26). As discussed, however, the Department did exactly that. (R 1212–18, 1243). It considered Muellenberg’s testimony on her physical condition as well as the medical evidence of Muellenberg’s condition. (R 1212–18, 1243). The Decision is entirely consistent with *Billman*.

In *Billman*, this Court stated that the Department must consider evidence in the aggregate to determine whether a claimant has presented a prima facie case for odd-lot benefits, rather than considering evidence in silo. 2021 SD 18, ¶ 41, 956 N.W.2d at 822. In *Billman*, the claimant was 62 years old. *Id.* at ¶ 2, 956 N.W.2d at 815. The claimant had a leg amputation below the knee due to a work injury and received a prosthetic leg. *Id.* at ¶ 5, 956 N.W.2d at 815–16. Unlike the present case, the claimant in *Billman* was assigned permanent work restrictions from his medical providers. *Id.* at ¶ 6, 956 N.W.2d at 816. Those restrictions included light duty work, lifting no more than 20 pounds, and restrictions from squatting, kneeling, or going up and down ladders. *Id.* The claimant brought a petition seeking odd-lot benefits. *Id.* at ¶ 10, 956 N.W.2d at 816.

When the petition was brought for hearing, the claimant testified to his physical limitations. *Id.* The claimant testified to his difficulties walking on uneven surfaces, standing, and sitting for extended periods. *Id.* The Department found the claimant’s testimony on his physical limitations was consistent with his work restrictions. *Id.* at ¶ 18, 956 N.W.2d at 818. However, the Department found that the claimant failed to show obvious unemployability by considering each of the factors SDCL 62-4-53—physical

condition, age, training and experience, and types of work available—in isolation. *Id.* at ¶ 37, 956 N.W.2d at 822.

This Court found that the decision was clearly erroneous. *Id.* at ¶ 41, 956 N.W.2d at 822–23. In that case, it was uncontested that the claimant’s age hurt his ability to find employment, but the Department made a factual finding that there was “no clear evidence [claimant’s] age has prevented him from finding employment.” *Id.* at ¶ 36, 956 N.W.2d at 822. The Court found that finding was error. *Id.* Additionally, the Court found that the Department erred by looking at claimant’s age, physical condition, ability to adapt to new employment, and training in silo rather than in the aggregate. *Id.* at ¶¶ 36–38, 956 N.W.2d at 822. When the Court looked at these factors in the aggregate, it found the Department clearly erred by finding that the claimant was not obviously unemployable. *Id.* at ¶ 41, 956 N.W.2d at 822–23.

Unlike *Billman*, here, there is no evidence that the Department failed to consider Muellenberg’s SDCL 62-4-53 factors in the aggregate. (R 1212–18, 1243). Muellenberg does not even argue that she is entitled to odd-lot benefits based on a review of evidence in the aggregate. Rather, Muellenberg argues she is entitled to odd-lot benefits based solely on her self-imposed physical limitations. (*See* Appellant’s Brief at 22–27). There is no dispute that jobs were available to Muellenberg if she drove to Redfield or a nearby town. (R 330, 1122–23). There is also no dispute that Muellenberg had the skills necessary for those jobs and those jobs would pay at or above her workers’ compensation rate. (R 322–324, 330, 1122–23). Notably, unlike in *Billman*, Muellenberg’s opinion on her physical limitations was also inconsistent with her medical providers, who opined Muellenberg could drive and work. (R 139, 1085–90).

Next, Muellenberg argues that the Department clearly erred by accepting the opinion of her own medical provider on her work restrictions rather than her testimony on her ability to work. (Appellant's Brief at 28–31). But nothing in *Billman* required the Department to accept Muellenberg's opinion over that of her medical providers. To the contrary, the *Billman* Court required the Department to consider both medical evidence of work restrictions along with the claimant's *consistent* testimony of his physical limitations. The Department has done that in this case, and after weighing that evidence, found that Muellenberg failed to sustain her burden of proof. (R 1212–18, 1243). *Billman* is unhelpful to Muellenberg, and the Decision should be affirmed.

Although not expressly stated in her brief, Muellenberg's appeal essentially asks this Court to decide a factual dispute in her favor. Before the Department, there was disputed evidence about whether Muellenberg could drive and whether she was physically able to work. The medical evidence showed that Muellenberg could drive and had no work restrictions. (R 139, 1085–90). That evidence was disputed only by Muellenberg's testimony that she could not drive or work remotely due to her vision. (R 225, 229–30). The Department, in weighing all the evidence, decided this factual dispute in Employer's and Insurer's favor. (R 1212–18, 1243). That finding is not clearly erroneous because it is supported by substantial evidence, including Dr. Martin's and Dr. Ringeisen's opinions that Muellenberg could drive and work. Muellenberg is not allowed to relitigate her claim on appeal and seek a different outcome.

Muellenberg then cites *Kurtz v. SCI*, 1998 SD 37, 576 N.W.2d 878, for the proposition that the Department was required to accept Muellenberg's testimony on her physical condition over the opinions of her medical providers. (Appellant's Brief at 26–

27). But *Kurtz* did not require the Department to accept the testimony of a claimant on her physical condition over that of her medical providers. In *Kurtz*, the claimant brought a petition for odd-lot benefits based on continuous pain rather than any work restrictions or physical disability. 1998 SD 37, ¶¶ 2–5, 576 N.W.2d 878, 880–81. In that case, this Court affirmed that the Department properly considered the claimant’s testimony of her physical condition *and* that of her medical providers in finding the claimant was entitled to odd-lot benefits. *Id.* at ¶¶ 16–20, 576 N.W.2d at 884–85. The Department has performed that same review in this case. After considering the testimony of Muellenberg’s medical providers as well as Muellenberg’s inconsistent testimony, it found the testimony of Muellenberg’s medical providers more persuasive. This factual determination is well within the Department’s purview. *See Loewen v. Hyman Freightways, Inc.*, 1997 SD 2, ¶ 11, 557 N.W.2d 764, 767.

Muellenberg then cites *Engel v. Prostrullo Motors*, 2003 SD 2, 656 N.W.2d 299, for the proposition that the Department can find a claimant entitled to odd-lot benefits without any medical work restrictions. (Appellant’s Brief at 27). However, *Engel* was a chronic pain case. *Engel*, 2003 SD 2, ¶¶ 1–14, 656 N.W.2d at 300–01. This Court has never held, and Employer and Insurer are unaware of any court that has held, that a claimant may be entitled to odd-lot benefits based on a physical disability without work restrictions from a qualified medical provider.

Additionally, to the extent Muellenberg argues she is entitled to odd-lot benefits based on severe, debilitating pain, that argument is barred. Muellenberg did not raise that argument before the Department and therefore waived it. (R 1364). “[A]n issue not raised at the agency level in an administrative proceeding cannot be raised for the first time on

appeal of the administrative decision.” *Stuckey v. Sturgis Pizza Ranch*, 2011 SD 1, 793 N.W.2d 378, 386; *see also Cain v. Fortis Ins. Co.*, 2005 SD 39, ¶ 22, 694 N.W.2d 709, 714 (same). For this reason, the Circuit Court declined to consider Muellenberg’s argument on appeal that she was entitled to odd-lot benefits based on pain. (R 1364). Likewise, to the extent Muellenberg attempts to argue that she is entitled to odd-lot benefits based on severe, debilitating pain to this Court, that argument is still barred. *See Stuckey*, 2011 SD 1, 793 N.W.2d at 386.

Next, Muellenberg argues that the Department found her credible because it did not issue any factual findings that she was not. (Appellant’s Brief at 30–31, n.4). This argument too must be rejected.

The absence of any factual findings on Muellenberg’s credibility does not support an inference that the Department found Muellenberg credible or accurate. “If a particular factual finding was not necessary to the trial court’s determination, and the trial court did not expressly make the finding, an appellate court will not presume that the finding was made.” *Marriage of Finney-Chokey*, 280 Or. App. 347, 360, 381 P.3d 1015, 1023 (2016). This principle is especially true when an alleged implicit factual finding—here, Muellenberg’s credibility—is inconsistent with the Department’s express finding that Muellenberg’s testimony was unpersuasive. *See Matter of D.L.B.*, 2017 MT 106, ¶ 14, 387 Mont. 323, 328, 394 P.3d 169, 173 (“This Court will not imply otherwise essential findings if the implied findings would be inconsistent with express findings made.”); *Jones v. State*, 314 Ga. 214, 236, 875 S.E.2d 737, 753 (2022) (“[A]ppellate courts cannot make alternative findings of fact that are contrary to those explicitly or implicitly made by the trial court where other evidence exists that supports the trial court’s findings.”).

This Court cannot infer the Department found Muellenberg's testimony credible when that issue was not dispositive, the Department issued no factual findings on credibility, and any implicit factual findings on Muellenberg's credibility would be inconsistent with the Department's determination that Muellenberg was not permanently and totally disabled.

Similarly, Muellenberg suggests that this Court may find her testimony was accurate because Employer and Insurer did not state she was "lying, faking, exaggerating or malingering." (*See* Appellant's Brief at 23). This is improper as this Court will not decide facts. *See Graham v. State*, 328 N.W.2d 254, 256 (S.D. 1982) ("It is not our function to make findings or conclusions rather, it is our province to determine if the findings are supported by evidence and if the conclusions are warranted by findings."). To the extent Muellenberg asks this Court to make factual findings on her credibility or the accuracy of her testimony, her request must be dismissed.

Moreover, Employer and Insurer have not conceded that Muellenberg's testimony is truthful or accurate merely because they have not accused Muellenberg of perjury. To the contrary, Employer and Insurer challenged the veracity of Muellenberg's testimony by pointing out that she never reported that she needed to "rest" her eye to her medical providers for three and a half years. (R 1192–93). Muellenberg only reported these issues at hearing and to Audet. (R 229–31, 233–34, 312–13, 330, 334). Employer and Insurer also disputed the accuracy of Muellenberg's testimony. Employer's and Insurer's defense rested, in large part, on Dr. Martin's and Dr. Ringeisen's opinions that Muellenberg was able to drive and work without restrictions, which directly contradicted Muellenberg's

testimony. (R 1186–89). The Department did not find, and Employer and Insurer did not concede, that Muellenberg was credible or that her testimony was accurate.

Even if this Court could infer that the Department found Muellenberg credible, that implied factual finding is not dispositive. The Department could have found Muellenberg’s beliefs on her physical limitations, although true to her subjective experience, were not objectively accurate. This is especially true when Muellenberg admitted that she had never tried driving with an eye patch and did not attempt to find employment for over three years after the Work Injury. (R 237–38, 247). In other words, the Department may have believed Muellenberg but still found Muellenberg’s opinion on her abilities unpersuasive. Muellenberg’s credibility is not the dispositive issue. The dispositive issue is whether, considering the evidence in the aggregate, the Department clearly erred in finding that Muellenberg was not entitled to odd-lot benefits. For all the reasons previously discussed, the Department’s finding is supported by substantial evidence and should be affirmed.

Moreover, even if the Department found Muellenberg credible, it does not mean the Department found the testimony of Muellenberg’s medical providers—that she could drive and had no work restrictions—was not credible. To the contrary, the Department accepted the opinions of Dr. Martin and Dr. Ringeisen that Muellenberg could work and drive. (*See* R 1216)

In sum, when the Court reviews the Decision, there is no clear error. The Department considered both Muellenberg’s subjective complaints on her physical condition as well as contradictory, objective evidence from Muellenberg’s providers that Muellenberg was able to work and drive. Then, after weighing this evidence, the

Department found that Muellenberg failed to establish a prima facie case of obvious unemployability. In doing so, the Department assigned greater weight to objective medical evidence that Muellenberg was able to drive, which is consistent with South Dakota law. As the Department's decision is well-supported, there was no error. The Decision should be affirmed, and no further analysis is required.

2. Muellenberg waived her claim for odd-lot benefits based on the “unavailability of suitable employment.”

Briefly, Muellenberg argues that she has established a prima facie case of odd-lot benefits by showing the “unavailability of suitable employment by showing that she has made reasonable efforts to find work and was unsuccessful.” (Appellant's Brief at 34). Muellenberg did not bring this argument before the Department and so it is waived. (R 1249, 1203–09, 1364). “[A]n issue not raised at the agency level in an administrative proceeding cannot be raised for the first time on appeal of the administrative decision.” *Stuckey v. Sturgis Pizza Ranch*, 2011 SD 1, 793 N.W.2d 378, 386. The Court should decline to consider this argument as Muellenberg raised it for the first time on appeal. *See id.*

Even if the Court were to entertain this argument, Muellenberg has not satisfied her burden. It is undisputed that there was suitable employment for Muellenberg in Redfield. Muellenberg's claim that there was not rested solely on her testimony that she could not drive to Redfield. (R 322–24, 1122–23). However, the Department entered factual findings rejecting that testimony and instead finding that Muellenberg could drive to Redfield. (R 1223–31). As discussed, that finding was not clearly erroneous.

B. Should the Court consider Muellenberg’s argument that a claimant may be entitled to odd-lot benefits without work restrictions, it should reject that argument.

As discussed, Muellenberg incorrectly argues that the Decision was based solely on the Department’s determination that she could not establish entitlement to odd-lot benefits without work restrictions from a medical provider. (Appellant’s Brief at 24–25). Muellenberg then argues this determination was incorrect as a matter of law because work restrictions are not required to establish odd-lot benefits when a claimant alleges disability based on her physical condition, combined “with the employee’s age, training, and experience and the type of work available in the employee’s community” under SDCL 62-4-53. (Appellant’s Brief at 24–31).

As discussed above, however, the Decision cannot be so narrowly construed. The Department did not find that work restrictions were required to establish an odd-lot claim as a matter of law. (R 1212–18, 1243–52). Nowhere does the Department make any legal finding that Muellenberg could not be entitled to odd-lot benefits without work restrictions—although Employer and Insurer submit that finding would be consistent with South Dakota law. (R 1212–18, 1243–52).

Nonetheless, even if the Court were to consider Muellenberg’s argument that a claimant can be entitled to odd-lot benefits based on a physical condition without work restrictions, it should reject that argument. Muellenberg argues SDCL 62-4-53 provides authority for her claim that work restrictions from medical providers are unnecessary to establish odd-lot benefits. (Appellant’s Brief at 24–27). She states that, because SDCL 62-4-53 does not expressly require such work restrictions, objective evidence of work restrictions are unnecessary for an odd-lot claim. (Appellant’s Brief at 24–27).

The Court must reject this argument. First, Muellenberg cites no authority, from any jurisdiction, that allows a workers' compensation claimant to be entitled to odd-lot benefits without any objective work restrictions from a qualified medical provider. Nor does Muellenberg cite any authority, from any jurisdiction, that allows a claimant to be entitled to odd-lot benefits based solely on the claimant's subjective opinion of his or her ability to work. Muellenberg's failure to cite authority to support her argument that objective work restrictions are unnecessary for odd-lot claims waives that argument on appeal, and the Court need not consider it. *See Hart v. Miller*, 2000 SD 53, ¶ 42, 609 N.W.2d 138, 148 (noting that failure to cite authority in support of an argument in an appellant brief waives the argument); *State v. Banks*, 387 N.W.2d 19, 22–23 (S.D. 1986) (same).

Nor does SDCL 62-4-53 provide authority that a claimant may be entitled to odd-lot benefits without formal work restrictions or otherwise based solely on the claimant's subjective opinion of her own limitations. SDCL 62-1-1, defining a compensable work injury, also does not expressly require expert testimony on causation. Nevertheless, this Court has repeatedly held "[e]xpert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 362 (S.D. 1992). "In such a case the testimony of an expert is necessary to assist the fact-finder in reaching a decision." *Id.*

When a claimant asserts a claim for odd-lot disability based on a physical condition, expert testimony is necessary as a physical or medical condition is within the purview of experts. Therefore, expert testimony should be required on work restrictions to establish a claim for odd-lot disability under SDCL 62-4-53, just as it is for causation

under SDCL 62-1-1. Muellenberg's visual impairments are outside the purview of a lay person, so expert testimony is required to establish her work restrictions. Muellenberg failed to present any such expert testimony showing she had any work restrictions in support of her odd-lot claim. The Court should determine medical evidence is necessary to establish work restrictions for an odd-lot claim based on physical disability. A claimant's own opinions on her or her abilities cannot be sufficient. *See Caldwell*, 489 N.W.2d at 362.

Moreover, to the extent Muellenberg asks this Court to find that a claimant's work restrictions from a medical provider cannot rebut a claimant's testimony on his or her physical condition, that request must also be rejected. If objective medical evidence cannot be considered along with a claimant's testimony of her physical condition, then every workers' compensation claimant could establish odd-lot benefits through their own testimony. Employers and insurers must be permitted to defend a claim with objective, medical evidence of a claimant's physical ability and work restrictions.

For example, if an injured employee is given a 40-pound lifting restriction, but the employee is only comfortable lifting 5 pounds, then the employee is dictating restrictions that are inconsistent with medical evidence. Public policy does not allow an employee to disregard expert opinions and pick their own restrictions. If it did, every injured employee would place undue restrictions on themselves to become permanently and totally disabled. This cannot be the law.

Instead, South Dakota law wisely imposes objective standards that must be satisfied to drive and to receive workers' compensation benefits. Without these objective standards, the entire workers' compensation system would break down. Muellenberg's

demand to set her own work restrictions is no different from a student who receives a C grade, but gives herself an A grade, and further demands a scholarship for A students based on her self-grading. If that were permissible, every student would be an A student, and educators would not be able to distinguish between students deserving of scholarships from those who are not.

Nor is Muellenberg's request different from a taxpayer who is assessed as owing \$5,000 in taxes under the tax code but then demands to pay only \$50 because the taxpayer "feels" that is all she owes. If this were permissible, the government would quickly become insolvent because nobody would agree to the government's assessment of taxes owed. Similarly, objective standards are necessary to prove entitlement to workers' compensation benefits for that system to remain solvent and provide compensation to injured workers with an objectively established need.

To be clear, Employer and Insurer do not contend that Muellenberg's testimony on her physical condition should be given no weight. Employer and Insurer simply contend that a claimant's own opinion of her ability to work cannot be the only evidence necessary to establish a compensable condition. Employers and insurers should be allowed to defend against an odd-lot claim by presenting objective evidence of disability from a qualified medical provider. Muellenberg cites no authority, in any jurisdiction, and Employer and Insurer are not aware of any authority, that permits a workers' compensation claimant to establish odd-lot benefits based on their own testimony that they are unable to work. Because the effect of a physical disability or medical condition on a claimant's ability to work safely does "not fall within the common experience and

capability of a lay person to judge,” expert testimony is required to establish work restrictions for an odd-lot disability claim. *See Caldwell*, 489 N.W.2d at 362.

C. The Department’s finding that there was suitable work for Muellenberg was not clearly erroneous.

Because the Department did not clearly err in finding that Muellenberg did not establish a prima facie case for odd-lot benefits, this Court does not need to consider whether the Department erred in finding that there was suitable work for Muellenberg. *See* SDCL 62-4-53. However, if the Court considers this issue, the Decision should still be affirmed.

Muellenberg argues that there was no work available for her, again, based solely on her testimony that she could not drive or use a computer for more than a few minutes at a time. (Appellant’s Brief at 35–38). Muellenberg also argues the Department erred by accepting Kollars’s testimony because, in her view, Kollars failed to consider her testimony on her physical condition. (*Id.* at 36–39). Muellenberg’s arguments fail on both fronts.

It is undisputed that there was work available for Muellenberg—for which she was qualified—if she travelled ten miles to Redfield. (R 322–24, 330, 1122–23). Muellenberg’s claim that work was “unavailable” to her is based on her testimony that she could not drive to Redfield or look at a computer screen for more than a few minutes. (Appellant’s Brief at 35–38). However, because there was contradictory evidence—that Muellenberg could drive and had no work restrictions—from Dr. Martin and Dr. Ringeisen, the Department’s finding that there was suitable work cannot be clearly erroneous. *See Schneider v. S. Dakota Dep’t of Transp.*, 2001 SD 70, ¶ 14, 628 N.W.2d

725, 729 (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”).

Likewise, contrary to Muellenberg’s argument, Kollars considered Muellenberg’s testimony on her physical limitations. Kollars reviewed Muellenberg’s deposition and, because Muellenberg had stated she was uncomfortable driving, limited his labor market survey to Redfield. (R 1120, 1136, 1142). When Kollars contacted employers, he also disclosed, accurately, that Muellenberg had vision problems but no work restrictions. (R 1120–22). Moreover, Kollars’s opinion was supported by Dr. Martin’s and Dr. Ringeisen’s opinion that Muellenberg could drive and had no work restrictions. (R 1120, 1142). The Department found Kollars’s testimony more persuasive than Audet’s testimony. (R 1218). As there was substantial evidence to support Kollars’s opinion, there was no error. *See Hendrix v. Graham Tire Co.*, 520 N.W.2d 876, 879 (S.D. 1994).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, Employer and Insurer respectfully request that the Decision be affirmed. The sole issue before this Court is whether the Department clearly erred in finding that Muellenberg was not permanently and totally disabled. The Department did not err because the Decision is supported by substantial evidence, primarily, undisputed medical testimony that Muellenberg had no work restrictions and could drive. Moreover, the Department did not err by assigning more weight to the opinions of Muellenberg’s medical providers on her physical condition and work restrictions than to Muellenberg’s testimony. The Department’s finding is also consistent with South Dakota law requiring the testimony of experts on matters outside the purview of a lay person. Employer and Insurer respectfully request oral argument in this matter.

Dated this 28th day of May, 2026.

/s/ Charles A. Larson

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 9,503 words, Times New Roman Font, 12 point, and 50,454 characters (no spaces).

Dated this 28th day of May, 2026.

/s/ Charles A. Larson

Charles A. Larson

CERTIFICATE OF SERVICE

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 31386

LINDA MUELLENBERG,

Claimant and Appellant,

VS.

**REDFIELD ACE HARDWARE DBD INVESTMENT ENTERPRISES,
and FIRST DAKOTA INDEMNITY COMPANY,**

Employer and Insurer and Appellees.

**APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA**

**THE HONORABLE MARGO D. NORTHRUP
CIRCUIT COURT JUDGE**

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

Before addressing both the factual and legal errors and flaws in the employer and insurer's arguments, it is important to note the undisputed evidence in this case. It is undisputed that Claimant Linda Muellenberg ("Muellenberg") suffered a permanent, life-altering injury to her eye and optic nerve. It is undisputed that Muellenberg's injuries are covered and compensable pursuant to the South Dakota Workers' Compensation system. It is undisputed that all medical evidence, including the independent medical examination, confirmed that she struggles with depth perception, object permanency, tunnel vision and peripheral vision, including not being able to see the court reporter to her left at the hearing. This is the starting point for the analysis of this case. Although these facts are undisputed, the employer and insurer made multiple arguments that are inconsistent with the undisputed evidence in the record and also ignored or failed to address two factual and legal arguments.

I. REDFIELD ACE FAILED TO ADDRESS CRUCIAL LEGAL AND FACTUAL ISSUES.

Employer Redfield Ace Hardware DBD Investment Enterprises, and its insurer, First Dakota Indemnity Company (collectively referred to as "Redfield Ace") failed to address two key factual and legal issues in this case: (1) Redfield Ace did not address the plain language of SDCL 62-4-53; and (2) did not acknowledge the undisputed objective medical testimony that Muellenberg suffered permanent damage to her optic nerve. Each will be

addressed.

a. Redfield Ace never addressed that physical condition is broader than work restrictions.

SDCL 62-4-53 sets forth the factors to determine whether an injured worker qualifies for odd-lot permanent total disability benefits. *See Kurtz v. SCI*, 1998 S.D. 37, ¶ 14, 576 N.W.2d 878, 884-885. Adopting Redfield Ace’s argument, the Department of Labor (“the Department”) committed clear error when it confused work restrictions and physical condition in SDCL 62-4-53 and limited its analysis to work restrictions. Although this error is central to this appeal, Redfield Ace did not address the discrepancy between the Department’s analysis and the plain language of the statute. The “physical condition” analysis was ignored. As outlined below, along with the other factors in the statute, South Dakota law required the Department to consider the physical condition of the claimant and that is much broader than work restrictions. Redfield Ace did not cite any authority that work restrictions were required for permanent total disability benefits. They did not because it does not exist and, in fact, the opposite is true. The plain language of SDCL 62-4-53 and subsequent decisional law do not support Redfield Ace’s argument that formal written work restrictions are required for odd-lot disability benefits.

b. Redfield Ace never addressed the medical evidence showing a permanent injury to Linda Muellenberg's optic nerve and the resultant defects and limitations.

This case is not just about Muellenberg's vision. It is also about the damage to her optic nerve and the resultant permanent damage and limitations. Although the injury was to Muellenberg's eye and optic nerve, the words "optic nerve" do not appear anywhere in Appellees' brief. Redfield Ace never acknowledged or addressed the injury to the optic nerve. Redfield Ace discussed Muellenberg's vision and visual acuity but did not discuss the optic nerve and residual damages as result of that injury. *Appellees' Brief*, p. 18-19, 23. The reason that Redfield Ace did not discuss the optic nerve is because it is clear that Muellenberg qualifies for odd-lot disability benefits under SDCL 62-4-53 with the optic nerve damage and residual defects and limitations. Someone who suffered an injury to the optic nerve and now cannot accurately judge depth and speed, cannot see to the left and cannot tell whether an object is moving or not should not be forced to drive on the highways at high rates of speed. *Appellant's Brief*, p. 7-9.

II. REDFIELD ACE REFRAMED LINDA MUELLENBERG'S POSITION TO BE THAT SHE QUALIFIES FOR BENEFITS BASED SOLELY ON HER TESTIMONY REGARDING HER INJURIES, DEFECTS AND LIMITATIONS, WHICH IS NOT HER POSITION.

a. The plain language of SDCL 62-4-53 does not require work restrictions.

The various arguments about what is required under SDCL 62-4-53 can be viewed on a spectrum. On one end of the spectrum is Redfield Ace's

argument that formal written work restrictions are required under the statute and, without them, a claimant can never qualify for permanent total disability benefits. Redfield Ace wants this Court to adopt a per se rule that SDCL 62-4-53 requires formal written work restrictions and if a claimant is not assigned any then the claimant is automatically precluded from receiving permanent total disability benefits regardless of any other factors in the case including the claimant's physical condition, age, training, experience or background.

On the other end of the spectrum is that a claimant automatically qualifies for permanent total disability benefits based solely and exclusively on the claimant's testimony of injuries, defects and limitations. Even though Muellenberg has not advocated for this position, Redfield Ace attempts to reshape Muellenberg's position to make it appear that her argument is that she qualifies for benefits solely based on her testimony. *Appellee's Brief*, p. 30 ("Nor does SDCL 62-4-53 provide authority that a claimant may be entitled to odd-lot benefits without formal work restrictions or otherwise based *solely* on the claimant's subjective opinion of her own limitations.") (emphasis added).

b. SDCL 62-4-53 sets forth the factors to qualify for odd-lot permanent total disability benefits.

In between the two extremes proposed by Redfield Ace is what SDCL 62-4-53 and decisional law require for odd-lot benefits, which is a two part analysis: (1) an analysis of a claimant's "physical condition" using both objective medical evidence and testimony from the claimant on how the

injuries, defects and limitations affect the claimant, and (2) an analysis of the other factors set forth in the statute (age, training, experience and type of work available).

In *Black Hills Adventure Lodging, LLC v. S. Dakota Dep't of Lab. & Regul.*, 2025 S.D. 4, ¶ 27, 17 N.W.3d 893, 902 this Court stated:

When interpreting a statute, we begin with the plain language and structure of the statute. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

(Internal quotations and citations omitted). Further:

In construing a statute, our purpose is to discover the true intention of the law and that intention must be ascertained primarily from the language expressed in the statute. The intent of the law must be derived from the statute as a whole and by giving the statutory language its plain, ordinary and popular meaning.

Hauck v. Clay Cnty. Comm'n., 2023 S.D. 43, ¶ 6, 994 N.W.2d 707, 710

(quoting *State v. Ventling*, 452 N.W.2d 123, 125 (S.D. 1990)). Here, the language in SDCL 62-4-53 is “clear, certain and unambiguous” and must be given its “plain, ordinary and popular meaning.” SDCL 62-4-53 specifically uses the words “physical condition” and not “work restrictions.” This is not an ambiguous or complicated phrase and Redfield Ace’s position that work restrictions are required is not accurate based on the statute.

Further, the per se requirement for work restrictions ignores the four other factors set forth in the statute (age, training, experience and type of work available). Had the Legislature intended for work restrictions to be the

only factor, the Legislature could have enacted SDCL 62-4-53 to read: “An employee is permanently totally disabled if the employee’s [work restrictions] cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.” If Redfield Ace’s argument was the law, the Legislature would not have needed to include “physical condition,” “age,” “training,” “experience” or “type of work available” in the statutory analysis.

An analysis beyond formal written work restrictions is supported by decisional law. In analyzing odd-lot permanent total disability benefits, this Court repeatedly addresses both objective medical evidence and testimony from the claimant on limitations. In *Kurtz*, 1998 S.D. 37, ¶ 16, 576 N.W.2d at 884, this Court stated “[t]he claimant’s physical condition is key...of proving a prima facie case for odd-lot disability.” *See also Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, 956 N.W.2d 812; *Engel v. Prostrullo Motors*, 2003 S.D. 2, 656 N.W.2d 299. In *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916, 918-919 (S.D. 1991), this Court analyzed the claimant’s permanent total disability benefits based on his testimony regarding his physical condition, including pain, and stated “the outcome of the case hinges on whether the facts claimant was able to marshal about his physical condition, in combination with his age and background, make it so clear that he is totally disabled that the burden of showing employability is shifted to employer.” Furthermore, in these cases, the recitation of the claimant’s physical condition included both

injury and non-injury health conditions, which is consistent with an analysis of the “physical condition” factor in SDCL 62-4-53. The Department’s singular focus on work restrictions was wrong.

c. Physical condition encompasses both objective medical evidence and a claimant’s testimony.

In addition to mispresenting Muellenberg’s position that she qualified for benefits based only on her testimony, Redfield Ace also stated “[m]oreover, to the extent Muellenberg asks this Court to find that a claimant’s work restrictions from a medical provider cannot rebut a claimant’s testimony on his or her physical condition, that request must also be rejected.” *Appellee’s Brief*, p. 31. Redfield Ace continued “[i]f objective medical evidence cannot be considered along with a claimant’s testimony of her physical condition, then every workers’ compensation claimant could establish odd-lot benefits through their own testimony.” *Id.* No one is suggesting that the Department be required to simply accept what a claimant testifies to related to injuries, disability, defects, impairment or limitations. Objective medical evidence should be considered in determining a claimant’s physical condition. As consistent with case law, this evidence should be considered *along with* a claimant’s testimony, which is what did not happen in Muellenberg’s case. As addressed in detail below, for any public policy concerns expressed by Redfield Ace for relying on a claimant’s testimony, there are safeguards in place as the Department will make credibility

determinations and consider a claimant's testimony in conjunction with the medical evidence.

d. Linda Muellenberg's testimony regarding her limitations was credible.

In order to circumvent the fact that there is no evidence or dispute about Muellenberg's injuries, defects and limitations, Redfield Ace now argues that even though there was no finding of Muellenberg not being credible, there must have been an implicit finding Muellenberg was not a credible witness and/or had inconsistent testimony. *Brief of Appellant, p. 26* ("Employer and Insurer have not conceded that Muellenberg's testimony is truthful or accurate."). From the Department's written decision and the Findings of Fact and Conclusions of Law to the arguments made before the circuit court, Redfield Ace did not allege that Muellenberg was lying, faking, malingering or exaggerating her injuries, defects or limitations.

Had there been evidence that Muellenberg or her husband and sister were not credible or that she was exaggerating or lying about what she experienced on a daily basis because of the injury to her eye and optic nerve, Redfield Ace and the Department would have ensured that that finding was included in the written decision and Findings. The absence of such findings means that this case is not about credibility but how Muellenberg's testimony is applied to SDCL 62-4-53 and the "physical condition" analysis.

Even if this case involved disputed evidence regarding the veracity of Muellenberg and her witnesses' testimony, Redfield Ace's late attempt to

make it seem like Muellenberg was not a credible witness is only related to resting her eyes. *See Brief of Appellant, p. 26-27* (discussion that Redfield Ace disputed the testimony related to Muellenberg needing to rest her eyes). There is no allegation that her testimony was inconsistent or inaccurate regarding her defects with depth perception, object permanency, tunnel vision, inability to see to her left, pulling in her eye, pain, swelling and inflammation requiring daily or regular medication, fluctuating eye pressures which cause her pain, and the inability to accurately judge the speed of objects or rate of travel. (R. 37-53). Muellenberg's testimony was consistent with the undisputed medical evidence. There is no finding to the contrary and Redfield Ace's eleventh hour attempt to discredit Muellenberg is not an accurate recitation of the facts in the record and the Department's findings and conclusions.¹

The absence of a finding that Muellenberg and her witnesses were not credible is important as set forth in *Shepherd*, 467 N.W.2d 916. In finding that the Department was clearly erroneous when it denied odd-lot benefits, this Court awarded permanent total disability benefits based on the claimant's testimony stating:

¹ As Redfield Ace did not argue that Muellenberg had defects with her depth perception, object permanency and peripheral vision, they also do not argue that Muellenberg was lying when she testified that she has not and does not drive on highways and only drives short distances on gravel road. There is zero evidence or argument from Redfield Ace that Muellenberg has driven on highways or at high rates of speed since her injury in 2020.

No evidence was presented that claimant or his spouse were lying about his condition. No medical evidence was presented that demonstrated claimant's physical condition to be inconsistent with the symptoms he was reporting. No witnesses came forward to testify that claimant was engaged in any activity at odds with his pain or claimed limitations.

Id. at 920. The same reasoning applies here. Muellenberg's testimony regarding her injuries, defects and limitations should have been considered and there is no evidence in the record that she or her witnesses were lying about her condition. There is also no medical evidence that her physical condition was inconsistent with her testimony regarding her defects. Further, Redfield Ace did not call any witnesses who testified that she was engaged in activities that were at odds with her testimony, such as driving on highways.

e. There is no discrepancy between Linda Muellenberg and the medical evidence.

Similarly to Redfield Ace's attempt to now argue that Muellenberg provided inconsistent testimony, Redfield Ace also attempts to reframe this case as Muellenberg versus the medical providers. *Brief of Appellant*, p. 27 (comparing Muellenberg's testimony "as well as *contradictory, objective evidence from Muellenberg's providers.*") (emphasis added). The attempt to reframe this case as Muellenberg being adverse to the medical evidence is not accurate. There is no contradiction between Muellenberg's testimony regarding her defects and what she experiences and the objective medical evidence in the medical records, Dr. Alex Ringeisen's ("Dr. Ringeisen") notes

and testimony and the independent medical examination. All of the medical documentation and testimony confirm what is obvious – Muellenberg suffered permanent, life altering injuries to her eye and optic nerve.

The only difference is how her defects and limitations apply specifically to her. The independent medical examiner stated generically that some patients drive after eye injuries. (R. 107). Dr. Ringeisen testified that he defers to his patients and leaves it to their discretion about whether they can safely drive. (R. 1089-90). There is no overarching rule for injuries to the eye and optic nerve. Every injury is different and so are the lifelong residual effects and the patients' abilities to safely drive on highways at high rates of speed after an injury.

In this case, Muellenberg has not and does not drive on highways because of her difficulty and inability to do so safely. The stakes are high for her and the motoring public if she made a mistake or was not able to accurately see and predict depth, speed, object permanency and vehicles to her left. The reason that Redfield Ace is attempting to reframe the case as Muellenberg's testimony being contradictory to her doctor is because acknowledging that Muellenberg has serious, permanent defects to her eye and optic nerve is fatal to its position that she should be forced to drive on highways at high rates of speed. That is not what the workers' compensation laws require nor is that safe for Muellenberg or the general public. Redfield

Ace's framing of the case is not accurate nor is it supported by the evidence in the record.

f. Redfield Ace's examples highlight the Department's incorrect application of the law.

Redfield Ace uses two examples to justify its position that formal written work restrictions are required, including using the examples of a student who received a C grade but "demands" an A grade or a taxpayer who owes \$5,000 but "demands" to pay \$50. *Brief of Appellant, p. 31-32*. First, the workers' compensation system is designed to be nonadversarial and Muellenberg is not "demanding" benefits. *Sowards v. Hill Materials Co.*, 521 N.W.2d 649, 652 (S.D. 1994). She sought the benefits that the law allows given the nature and extent of her eye and optic nerve injury and the fact that she was not able to return to work after her injury. She is not asking for anything other than what she qualifies for as an injured worker under South Dakota law. The examples unfairly depict Muellenberg as a grifter who is demanding a grade or tax cut that she should not receive.

Second, both examples have an inherent fallacy – the assumption that the correct grading rubric or tax law was used to determine the grade or tax assessment. Redfield Ace's argument assumes that the right grading rubric was used for the student's C grade or that the taxpayer's assessment was based on the proper application of the law. But what if the teacher gave the student a C grade because the teacher used the wrong grading rubric? Or the taxpayer was assessed with \$5,000 in tax liability based on a misapplication

of the law? That is exactly what happened here. Muellenberg's benefits were denied based on an incorrect application of SDCL 62-4-53. For Muellenberg's case, had the correct grading rubric been used or the correct tax law been applied, the student who received a C grade would have received an A grade and the taxpayer would have been assessed taxes in the amount of \$50.

Redfield Ace's examples are the classic slippery slope argument, which is a policy argument. The plain language of SDCL 62-4-53 does not require formal written work restrictions and there is no support for a per se rule automatically deciding permanent total disability benefits based on formal written work restrictions. Further, the workers' compensation system already has safeguards in place to ensure that a claimant appropriately qualifies for benefits including:

- credibility determinations,
- objective medical evidence to document the injury and residual defects or impairments,
- functional capacity evaluations,
- surveillance evidence, and
- impeachment through inconsistent statements.

The public policy examples fail based on the plain language of SDCL 62-4-53 and decisional case law.

III. LINDA MUELLENBERG QUALIFIES FOR ODD-LOT PERMANENT TOTAL DISABILITY BENEFITS.

Had the Department properly considered Muellenberg's undisputed medical evidence and her testimony, Muellenberg would have qualified for permanent total disability benefits. The Department adopted Redfield Ace's

flawed argument that work restrictions were required and ignored the clear medical evidence of Muellenberg's injuries, defects and limitations. As such, Muellenberg should receive benefits.

a. Linda Muellenberg's objective medical evidence proved that she qualified for benefits.

As the law requires an analysis of both objective medical evidence and the testimony of a claimant, in this case, the objective medical evidence, as established by her medical records, treating physicians and the independent medical examiner, shows that Muellenberg suffered permanent damage to her eye and optic nerve. (Ex. 5, R. 1036-1044, p. 14-22); (R. 127-129, 148).

Her testimony regarding her limitations included:

- A pulling sensation in her eyes which requires her to rest her eyes "several" times a day, sometimes up to thirty minutes at a time. (H.T. 37, 53).
- Pain, swelling and inflammation requiring daily or regular medication. (H.T. 41-43).
- Trouble reading. (H.T. 38).
- Trouble using a keyboard as she cannot find the right key and has trouble appreciating how far or close objects are to her. (H.T. 40).
- Fluctuating eye pressures which cause her pain. (H.T. 35).
- Tunnel vision. (H.T. 45).
- No peripheral vision to her left. (H.T. 45).
- Inability to accurately assess and judge distance between objects. (H.T. 46, 49).
- Inability to accurately judge the speed of objects or rate of travel. (H.T. 46, 50).

- Inability to accurately assess object permanency. (H.T. 46-47).

Contrary to Redfield Ace's argument that "Muellenberg's visual impairments are outside the purview of a lay person," her testimony was supported by the objective medical findings. *Appellee's Brief*, p. 30-31.

Muellenberg's visual impairments were confirmed by all of the medical experts, including the independent medical examiner. This is not the case where there is no objective medical evidence to support a claimant's subjective reports of pain, disability, impairment or limitations. It is undisputed that her eye and optic nerve were permanently damaged and that she suffers from the residual effects from the damage to those body parts. *See Brief of Appellant*, p. 7-8, 13-15, 30. Further, the independent medical examiner provided a 9% whole body impairment rating for her permanent partial disability benefits. (R. 148). Both the objective medical testimony and Muellenberg's testimony were consistent and should have been considered under the "physical condition" factor in SDCL 62-4-53.

b. The vocational evidence proved Linda Muellenberg qualified for benefits.

Muellenberg qualifies for odd-Jot benefits and any decision to the contrary is a mistake. Muellenberg meets the statutory definition of odd-Jot disability due to her physical condition (significant defects and limitations), her age (63 years old), education (high school diploma and an expired LPN license), training and experience (recent history of being a sales cashier and

working on a sales floor) and the type of work available in her community have caused her to be unable to secure anything more than sporadic employment resulting in insubstantial income. She cannot safely get herself to and from her home to work any type of employment. The inability to drive on highways at high rates of speed means that she cannot commute and cannot reach the labor market in her rural community. There is no option to walk, bike or take public transportation.

Even if she could drive on highways at high rates of speed, she still has daily pain, swelling, high eye pressures, diminished vision, tunnel vision and poor depth perception. As testified by her vocational expert, she is obviously unemployable given her inability to commute and her residual and permanent injuries, defects and limitations.

As Muellenberg made a prima facie showing of benefits, the burden is on Redfield Ace to show some form of suitable work is regularly and continuously available to Muellenberg. SDCL 62-4-53. Redfield Ace did not do so. The erroneous assumption that formal written work restrictions were required was adopted by Redfield Ace's vocational expert, Chad Kollars ("Kollars"). Kollars's opinions were submitted via deposition testimony. There is no deference given to his opinions. *Baker v. Rapid City Regional Hosp.*, 2022 S.D. 40, ¶ 29, 978 N.W.2d 368, 378. Kollars never spoke to or met Muellenberg. (R. 1125, p. 32). The entirety of his opinions was based on the rejection of Muellenberg's testimony regarding her injuries, defects and

limitations. (R. 1125-1126, p. 33-34). Although he conceded that injured workers with her injuries, defects and limitations would struggle, he ignored that when performing his job search. (R. 1123-1126, p. 23-34). Redfield Ace failed to meet its burden given that Muellenberg cannot commute or routinely get herself to work and there are no alternative options given her rural location. The Department failed to properly consider the evidence and this Court should be definitely and firmly convinced that a mistake has been made.

CONCLUSION

The Department committed clear error by incorrectly limiting the analysis required under SDCL 62-4-53 and focusing solely on work restrictions. Muellenberg proved that she qualifies for permanent total disability benefits given the nature and extent of her injuries, defects and limitations that have rendered her unable to safely drive to any meaningful employment.

WHEREFORE, Linda Muellenberg respectfully requests that this Honorable Court *reverse* the Department's final order and the Circuit Court's order affirming it, and remand with instructions to grant her petition for permanent total disability benefits.

Respectfully submitted this 29th day of June, 2026.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,101 words, excluding the table of contents, table of cases, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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The undersigned hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT were served via Odyssey File and

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